UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC	)	
AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LA-3
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF ANSWER TO STATE OF VERMONT PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST

Beth Mizuno
Anita Ghosh
Mitzi Young
Jeremy Wachutka

Counsel for the NRC Staff

May 15, 2015

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer opposing the "State of Vermont's Petition for Leave to Intervene and Hearing Request" (Petition)[1] concerning a September 4, 2014, license amendment application (license amendment request or LAR)[2] filed by Entergy Nuclear Operations, Inc. (Entergy or the licensee), one of the holders of the operating license for the Vermont Yankee Nuclear Power Station (Vermont Yankee or VY)[3].

[1] State of Vermont's Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) (Petition) (available at Agencywide Documents Access and Management System (ADAMS) package Accession No. ML15110A484, which includes: Declaration of Anthony R. Leshinskie (Apr. 20, 2015) (Leshinskie Declaration); Anthony R. Leshinskie *curriculum vitae* (Leshinskie CV); Declaration of William Irwin, Sc.D, CHP (Apr. 20, 2015) (Irwin Declaration); William E. Irwin, Sc.D., CHP *curriculum vitae* (Irwin CV)); Exhibit 1, Comments of the State of Vermont [on Vermont Yankee Post-Shutdown Decommissioning Activities Report (PSDAR)] (Mar. 6, 2015) (Vermont's PSDAR Comments); Exhibit 2, Entergy Nuclear Vermont Yankee, LLC, Master Decommissioning Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002) (MTA).

[2] Letter from Christopher Wamser, Entergy, to NRC, Proposed Change No. 310 – Deletion of Renewed Facility Operation License Conditions Related to Decommissioning Trust Provisions, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405). The letter (LAR Transmittal Letter) transmits Attachment 1 (Description and Evaluation of Proposed Changes), Attachment 2 (Markup of Current Operating License Pages), and Attachment 3 (Retyped Operating License Pages).

[3] *See* Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Renewed Facility Operating License No. DPR-28 at 1 (Mar. 21, 2011) (ADAMS Accession No. ML052720265).

The LAR seeks deletion of license conditions that impose specific requirements on the VY Decommissioning Trust Fund (DTF) electing, as it is permitted by 10 C.F.R. § 50.75(h)(5), to be subject to the 10 C.F.R. § 50.75(h)(1)-(3) requirements instead.[4] The State of Vermont (Vermont) argues that the LAR should be denied because the proposed deletion of prior notification requirements for DTF withdrawals is "directly related to Entergy's pending exemption request" to use DTF for fuel management purposes and should be considered with financial predictions underlying VY decommissioning.[5] Vermont proffers four contentions, essentially claiming that the LAR fails to satisfy NRC decommissioning regulations, including regulations governing decommissioning trust fund assurance and environmental requirements.[6]

As set forth below, the Petition should be denied because the proposed contentions are inadmissible under 10 C.F.R. § 2.309(f)(1) and Commission case law. Vermont seeks to litigate matters beyond the limited scope of this proceeding and challenges NRC regulations without making the requisite showing of special circumstances via a 10 C.F.R. § 2.335(b) petition for waiver of (or an exception to) the regulations.[7] In addition, Vermont's contentions are not supported in law or fact, and fail to raise genuine disputes on material issues.

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[4] LAR Transmittal Letter at 1. Sections 50.75(h)(1) – (3) set forth the terms and conditions necessary to assure that funds in trust or other account will be available for their intended purpose. Decommissioning Trust Provisions [Final Rule], 67 Fed. Reg. 78,332, 78,333 (Dec. 24, 2002) (Decommissioning Trust Rule). *See also* 10 C.F.R. § 50.75(h)(1)(i). The provisions in 10 C.F.R. §§ 50.75(h)(1)-(3) "do not apply to any licensee that as of December 24, 2003, has existing license conditions relating to decommissioning trust agreements," but allows any such licensee to amend those conditions consistent with provisions in § 50.75(h). 10 C.F.R. § 50.75(h)(5).

[5] Petition at 1-2,

[6] Petition at 3-31.

[7] "The sole ground for petition for rule waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.335(b). The petition must be also be supported by affidavits that state with particularly the special circumstances alleged to justify the waiver or exception. *Id.*

Because Vermont's concerns relate to decommissioning, the Staff provides an overview of the power reactor decommissioning process and regulations governing the DTF before addressing the arguments raised in the Petition.

BACKGROUND

I. Overview of Power Reactor Decommissioning Process

The NRC requires that a nuclear power plant that permanently ceases power operations be decommissioned.[8] "*Decommission* means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits—(1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license."[9]

If a power reactor licensee decides to permanently cease operations, 10 C.F.R. § 50.82(a)(1) requires the licensee to (1) submit, under oath and affirmation per 10 C.F.R. § 50.4(b)(8), a written certification of permanent cessations of power operations to the NRC, indicating the date on which operations have ceased or will cease and (2) submit, under oath and affirmation per 10 C.F.R. § 50.4(b)(9), a written certification of the date on which fuel was permanently removed from the reactor vessel and the disposition of the fuel. Once these certifications are docketed (or when a final order to permanently cease operations becomes effective), "the 10 CFR part 50 license no longer authorizes operation of the reactor or emplacement and retention of fuel into the reactor vessel."[10]

Decommissioning, whether DECON, SAFSTOR or ENTOMB, must be completed within 60 years of the date of permanent cessation of operations unless the Commission approves a

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[8] *See* 10 C.F.R. § 50.82(a) (provisions regarding completion of decommissioning). Power reactor decommissioning must satisfy requirements in 10 C.F.R. Part 20, Subpart E, and 10 C.F.R. §§ 50.75, 50.82, 51.53(d), and 51.95(d).

[9] 10 C.F.R. § 50.2.

[10] 10 C.F.R. § 50.82(a)(2).

longer period by finding that the extension is necessary to protect the public health and safety.[11] Per 10 C.F.R. § 50.51(b), each license for a facility that has permanently ceased operations "continues in effect beyond the expiration date to authorize ownership and possession of the production or utilization facility, until the Commission notifies the licensee in writing that the license is terminated."

Within two years after submitting its "certification of permanent cessation of operations," a licensee must submit to the NRC a Post-Shutdown Decommissioning Activities Report (PSDAR), which (1) describes the planned decommissioning activities and a "schedule for their accomplishment," (2) discusses the reasons for concluding that "environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements," and (3) provides a site-specific [decommissioning cost estimate (DCE)] that includes projecting the cost of managing irradiated fuel.[12]

The NRC issues a *Federal Register* notice of receipt of the PSDAR, makes the PSDAR available for public comment, and holds a public meeting in the vicinity of the licensee's facility.[13] If the licensee certifies "permanent cessation of operations"[14] and permanent removal of fuel from the reactor vessel, the licensee may begin "major decommissioning activities," as

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[11] 10 C.F.R. § 50.82(a)(3). DECON (immediate dismantlement of equipment, structures and portions of the facility containing radioactive contaminants and removal or decontamination to a level that permits release of property and termination of the NRC license), SAFSTOR (deferred dismantlement and decontamination after a period that allows radioactive decay), and ENTOMB (permanent onsite encasement in a structurally sound material such as concrete and monitoring until radioactivity decays to a level permitting radioactive release) are described in NRC Backgrounder, Decommissioning Nuclear Power Plants at 1 (May. 2015) (ADAMS Accession No. ML040340625).

[12] 10 C.F.R. § 50.82(a)(4)(i).

[13] 10 C.F.R. § 50.82(a)(4)(ii).

[14] This term is defined, for a nuclear power reactor, as a licensee certification to the NRC that the licensee "has permanently ceased or will permanently cease reactor operation(s), or a final legally effective order to permanently cease operation(s) has come into effect." 10 C.F.R. § 50.2.

defined in 10 C.F.R. § 50.2,[15] 90 days after NRC receipt of the PSDAR and without specific NRC approval.[16] The 90-day period is considered the minimal time necessary for the NRC to evaluate a licensee's proposed decommissioning activities and hold a public meeting.[17]

Licensees are prohibited from performing any 10 C.F.R. § 50.2 decommissioning activities that would foreclose release of the site for possible unrestricted use, result in significant environmental impacts not previously reviewed, or result in there no longer being reasonable assurance that adequate funds will be available for decommissioning.[18] If a licensee takes actions permitted by 10 C.F.R. § 50.59[19] following submittal of its PSDAR, the licensee must "notify the NRC, in writing and send a copy to the affected State(s), before performing any decommissioning activity inconsistent with, or making any significant schedule change from, those actions and schedules described in the PSDAR, including changes that significantly increase the decommissioning cost."[20]

After issuance of the 1996 Decommissioning Rule, approval of a decommissioning plan and a hearing opportunity were no longer required for a licensee to perform major decommissioning activities. Instead, a hearing opportunity was provided with respect to the

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[15] 10 C.F.R. § 50.2 defines a "major decommissioning activity" as "any activity that results in permanent removal of major radioactive components, permanently modifies the structure of the containment, or results in dismantling components for shipments containing greater than class C waste in accordance with [10 C.F.R.] § 61.55 . . . ."

[16] 10 C.F.R. § 50.82(a)(5). This provision was part of the 1996 decommissioning rulemaking that was intended to (1) provide licensee with flexibility in implementing decommissioning, "especially with regard to premature closure," (2) increase opportunities for the public to be informed about licensee decommissioning activities, and (3) provide for NRC oversight commensurate with the level of safety concerns expected during decommissioning activities. Decommissioning of Nuclear Power Reactors [(Final Rule)], 61 Fed. Reg. 39,278, 39,279 (July 29, 1996) (Decommissioning Rule).

[17] *Id*. at 39,282.

[18] *Id*. at 39,282-283; 10 C.F.R. §§ 50.59(b) and 50.82(a)(6).

[19] 10 C.F.R. § 50.59 applies to Part 50 operating license holders, including licensees who have certified permanent cessation of their operations under 10 C.F.R. § 50.82(a)(1). Thus, a licensee could make, for example, a change to the facility or procedures as described in the final safety analysis report (FSAR), for example, if the change does not require a changes to the technical specifications (TSs) in license and does not meet in any of the criteria set forth in 10 C.F.R. § 50.59(c)(2).

[20] 10 C.F.R. § 50.82(a)(7).

termination of a licensee's NRC license.[21] In revising its regulations, the Commission concluded that major decommissioning activities are similar to those routinely performed under 10 C.F.R. § 50.59 and that the § 50.59 process could be used if NRC oversight commensurate with the status of the facility were continued.[22]

Even after decommissioning activities are completed, a license cannot be terminated without prior NRC approval. All licensees, as required by 10 C.F.R. § 50.82(a)(9), must submit "an application for termination of license" and each application must be accompanied or preceded by a license termination plan (LTP). The LTP "must be a supplement to the FSAR or equivalent," must be submitted at least two years before the license termination date and must include, *inter alia, a* site characterization, an identification of remaining dismantlement activities, plans for site remediation, an identification of any parts of the facility or site that were released for use before approval of the LTP, and plans for site remediation.[23]

If the LTP demonstrates that remaining decommissioning activities will be performed consistent with NRC regulations, and that license termination "will not be inimical to the common defense and security or to the health and safety of the public, and will not have a significant effect on the quality of the environment," then, after providing a hearing opportunity, "the Commission shall approve the plan, by license amendment, subject to such conditions and limitations as it deems appropriate and necessary and authorize implementation of the [LTP]."[24] The license will be terminated only if the Commission determines that the remaining dismantlement was performed consistent with the approved LTP and that the final radiation survey and associated documents (including the assessment of dose contributions from parts

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[21] 61 Fed. Reg. at 39,279, 39,320, 39,281.

[22] *Id*. at 39,279.

[23] 10 C.F.R. § 50.82(a)(9).

[24] 10 C.F.R. § 50.82(a)(10). Per 10 C.F.R. § 2.310, LTP hearings generally are to be conducted under 10 C.F.R. Part 2, Subpart L.

released for use before LTP approval) show that the facility and site meet the decommissioning criteria in 10 C.F.R. Part 20.[25]

NRC approval of a PSDAR is required only if a licensee combines its PSDAR with its LTP submitted under 10 C.F.R. § 50.82(a)(9), to seek approval of immediate decommissioning and termination of the license.[26] In that instance, an opportunity for a hearing and other requirements would apply to the combined document.[27]

The NRC has evaluated the environmental impacts of power reactor decommissioning on a generic basis in NUREG-0586, Supplement 1, "Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities," dated November 2002 (GEIS).[28] The PSDAR must include a discussion of reasons supporting the conclusion "that site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements."[29] NRC regulations do not require a licensee to submit an environmental report and do not require the NRC to issue an evaluation approving site-specific environmental impacts discussed in the PSDAR.[30]

Applicants for license amendments that authorize either unrestricted use (or continued restricted use) of the power reactor site or that approve an LTP or decommissioning plan under 10 C.F.R. § 50.82 that would authorize unrestricted use of the site or continued restricted use of the site, however, must submit a "Supplement to Applicant's Environmental Report—Post

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[25] 10 C.F.R. § 50.82(a)(11).

[26] 61 Fed. Reg. at 39,281.

[27] *See id.*

[28] GEIS, Supplement 1, is available at ADAMS Accession Nos. ML023470304, ML023470323, ML023500187, ML023500211, ML023500223. Supplement 1 updates the August 1988 NUREG-0586 to reflect technological advances in decommissioning operations, experience gained by licensees, and changes made to NRC regulations. The Supplement is intended to be used to evaluate environmental impacts during the decommissioning of nuclear power reactors as residual radioactivity at the site is reduced to levels that allow for termination of the NRC license and is considered a stand-alone document. GEIS at iii.

[29] 10 C.F.R. § 50.82(a)(9)(ii)(G).

[30] *See* 10 C.F.R. §§ 50.82(a)(4)(i) , 51.53(d), 51.95(d).

Operating License Stage," with updates to its operating license environmental report to reflect any new information or significant environmental change associated with decommissioning or irradiated fuel storage.[31] Similarly, 10 C.F.R. § 51.95(d) requires the Staff to prepare a supplement environmental impact statement (EIS) only for licensing actions that authorize unrestricted release (or continued restricted use of the facility site) or actions that authorize irradiated fuel storage at a nuclear power reactor after expiration of the operating license.

II. Decommissioning Financial Assurance Requirements

As noted above, a PSDAR must include a DCE. The 2002 Decommissioning Trust Provisions Rule (Decommissioning Trust Rule) requires that decommissioning trust agreements be in a form acceptable to the NRC in order to increase assurance that an adequate amount of decommissioning funds will be available for their intended purpose.[32] Prior to the issuance of the rule, licensing conditions delineating requirements for decommissioning trust agreements were included in certain licenses on a case-by-case basis.[33]

The proposed Decommissioning Trust Rule was published on May 30, 2001.[34] The NRC indicated that, with deregulation, oversight typically exercised by rate regulators could cease, resulting in the necessity for the NRC to take an active oversight role.[35] While sample language for decommissioning trust agreements was in guidance issued in NRC Regulatory Guide (RG) 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors,"[36] prior to December 2002, NRC regulations did not explicitly require that specific terms and

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[31] 10 C.F.R. § 51.53(d).

[32] 67 Fed. Reg. at 78,332 (citing Staff Requirements Memorandum (SRM) on SECY-99-170 (Aug. 10, 1999).

[33] *Id.*

[34] Decommissioning Trust Provisions [Proposed Rule], 66 Fed. Reg. 29,244, 29, 245 (May 30, 2001).

[35] *Id.* at 29,245.

[36] *Id.* The most recent version of RG 1.159 is available at ADAMS Accession No. ML112160012.

conditions be included in decommissioning trust agreements or that such agreements be in a form acceptable to the NRC.[37]

The decommissioning trust rulemaking sought to remedy that situation by modifying 10 C.F.R. 50.75(e) to "specify that the trust should be an external trust fund in the United States, established under a written agreement with an entity that is a State or Federal government agency or an entity whose operations are regulated by a State or Federal agency.[38] A new 10 C.F.R. § 50.75(h) was added to the Commission's regulations to discuss "the terms and conditions that the NRC believes are necessary to ensure that funds in the trust will be available for their intended purpose."[39] Except for withdrawals being made under 10 C.F.R. § 50.82(a)(8) (which sets forth the authorized uses of decommissioning funds), § 50.75(h)(1)(iv) prohibits the trustee from making disbursements or payments (other than for payment of ordinary administrative expenses) from the trust until the trustee gives the NRC prior written notice of 30 working days. Section 50.75(h)(1)(iv) similarly prohibits disbursement or payments from the trust if the trustee receives a written NRC objection during that notice period. "After decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8)," no further notice to the NRC is required.[40]

The license conditions imposed on non-electric utilities on a case-by-case basis are similar to (and predated) those in the Decommissioning Trust Rule. In response to a comment that sought clarification at to "whether provisions in the proposed rule will supersede license conditions previously imposed in license transfer proceedings, or whether licensees with existing license conditions governing decommissioning trusts must apply to amend their licenses and whether these amendment applications would then be subject to hearings," the

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[37] *See* 66 Fed. Reg. at 29,245.

[38] 67 Fed. Reg. at 78,333.

[39] *Id*. *See supra* note 4.

[40] 10 C.F.R. § 50.75(h)(1)(iv).

NRC stated that the final rule would "only apply to licensees that are no longer regulated by State [Public Utility Commissions] or [the Federal Energy Regulatory Commission (FERC)], with the exception that all power reactor licensees, both rate regulated or otherwise, [must] notify the NRC in advance of decommissioning trust withdrawals if these withdrawals are made before permanent cessation of operations."[41] The NRC reasoned that such withdrawals might be made without a rate regulator's knowledge, but excluded any withdrawals immediately deposited into another decommissioning trust fund.[42]

The NRC also clarified that licensees "have the option of maintaining their existing license conditions or submitting to the new requirements."[43] The NRC explained that the rule applies "to all present and future licensees that are or will no longer be under FERC or State rate regulation or that otherwise meet NRC's definition of 'electric utility,' with the same exception as noted above."[44] Thus, the NRC required that it receive advance notification of decommissioning trust withdrawals "made before permanent cessation of operations or if they are not made under a post-shutdown decommissioning activities report or license termination plan."[45]

Despite complaints about unnecessary burdens associated with the 30-day notification requirement for disbursements in 10 C.F.R. § 50.75(h), the NRC concluded that timely information was needed to monitor licensees, particularly when the licensee is not in decommissioning under a PSDAR or an approved license termination plan under 10 C.F.R. § 50.82(a).[46] The final rule clarified that licensees who have complied with 10 C.F.R.

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[41] *Id.* at 78,334.

[42] *Id.*

[43] *Id.* at 78,335. As indicated above, the 10 C.F.R. § 50.75(h)(5) permits amendments of trusts consistent the terms and conditions in 10 C.F.R. § 50.75(h).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 78,335-336.

§ 50.82(a)(4) (*i.e.,* submitted a PSDAR that describes, among other things, planned decommissioning activities as well as a schedule for their completion, and provides a site-specific DCE, including the projected cost of managing irradiated fuel) *would be exempt from restrictions on disbursements* because the restrictions would not add any assurances that funding is available and would duplicate the notification requirements in 10 C.F.R. § 50.82.[47]

Section 50.82(a)(8)(i) provides that decommissioning trust funds "may be used by licensees" if:

> (A) The withdrawals are for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in 10 C.F.R. § 50.2;
>
> (B) The expenditure would not reduce the value below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen expenses arises; and
>
> (C) The withdrawals would not inhibit the ability of the licensee to complete funding of any shortfalls in the decommissioning trust needed to ensure the availability of funds to ultimately release the site and terminate the license.

Initially, licensees may only use for decommissioning planning three percent of the generic amount specified in 10 C.F.R. § 50.75, however, licensees that have submitted 10 C.F.R. § 50.82(a)(1) certifications may use an additional 20 percent commencing 90 days after the NRC has received the PSDAR, but a site-specific DCE is required prior to licensees using any funding in excess of the 23 percent.[48] Licensees must submit a site-specific DCE within two years following permanent cessation of operations.[49] If the decommissioning method includes a period of storage or surveillance that delays completion of decommissioning (e.g., SAFSTOR), the licensee

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[47] *Id*. at 78,336; 10 C.F.R. § 50.82(a)(4).

[48] 10 C.F.R. § 50.82(a)(8)(ii).

[49] 10 C.F.R. § 50.82(a)(8)(iii).

"must provide a means of adjusting costs estimates and associated funding levels over the storage and surveillance period."[50]

After the licensee submits the site-specific DCE required by 10 C.F.R. § 50.82(a)(4)(i), and "until the licensee has completed its final radiation survey" and demonstrates reduction of residual radioactivity to a level that permits termination of its license, "the licensee must annually submit to the NRC, by March 31, a financial assurance status report" that includes information "current through the end of the previous calendar year" on:

> (A)The amount spent on decommissioning, both cumulative and over the previous calendar year, the remaining balance of any decommissioning funds and the amount provided by other financial assurance methods being relied upon;
> (B) An estimate of the costs to complete decommissioning, reflecting the difference between actual and estimated costs for work performed during the year, and the decommissioning criteria upon which the estimate is based;
> (C) Any modifications occurring to a licensee's current method of providing financial assurance since the last submitted report; and
> (D) Any material changes to agreements or financial assurance contracts.[[51]]

"If the sum of the balance of any remaining decommissioning funds, plus earning on such funds calculated at not greater than two percent real rate of return, together with the amount provided by other financial assurance methods being relied upon," is insufficient to cover estimated decommissioning completion costs, "the financial assurance status report must also include additional financial assurance to cover the estimated cost of completion."[52]

After submitting its site-specific DCE per 10 C.F.R. § 50.82(a)(4)(i), the licensee must also annually submit, by March 31, a report on the status of its funding for managing irradiated fuel and include (a) the amount of funds accumulated to cover the cost of managing irradiated

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[50] 10 C.F.R. § 50.82(a)(8)(iv).

[51] 10 C.F.R. § 50.82(a)(8)(v).

[52] 10 C.F.R. § 50.82(a)(8)(vi).

fuel, (b) the projected cost of managing irradiated fuel until title to and possession of the fuel is transferred to the Department of Energy (DOE), and (c) if funds accumulated do not cover the projected cost, a plan to obtain additional funds to cover the cost.[53]

Exemptions from 10 C.F.R. §§ 50.82 and 50.75(h) requirements have been granted for a few plants undergoing decommissioning. The Staff has approved exemptions allowing withdrawals to be made without prior notification to the NRC and permitting the use of decommissioning trust funds for purposes other than decommissioning in instances where the level of funding needed to complete decommissioning is not adversely affected.[54] In each instance and acting under the authority delegated to it by the Commission, the Staff found, pursuant to 10 C.F.R. § 50.12, the exemptions were authorized by law, presented no undue risk to public health and safety, and were consistent with the common defense and security, and found that the application of the rules was unnecessary to achieve the underlying purpose of the rules.[55]

The Staff has also previously approved a license amendment that deleted decommissioning trust conditions. In May 2003, the Comanche Peak operating license was amended to delete certain decommissioning trust agreement conditions that were imposed when the license was transferred to a non-electric utility.[56] The deleted conditions included

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[53] 10 C.F.R. § 50.82(a)(8)(vii).

[54] *See, e.g.,* Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 5795 (Feb. 3, 2015) (Crystal River Exemption) (granting exemptions from §§ 50.82(a)(8)(i)(A) and 50.75(h)(2) to allow trust fund withdrawals for irradiated fuel management and site restoration activities without prior NRC notification based on finding that there is reasonable assurance of sufficient financial resources for both activities).

[55] *Id.*; Southern California Edison Company; San Onofre Nuclear Generating Station, Units, 2 and 3, 79 Fed. Reg. 55,019 (Sept. 15, 2014) (granting exemptions from §§ 50.82(a)(8)(i)(A) and 50.75(h)(2) to allow trust withdrawal for irradiated fuel management and site restoration activities without prior NRC notification); License Exemption Request for Dominion Energy Kewaunee, Inc., 79 Fed. Reg. 30,900 (May 29, 2014) (granting exemptions from §§ 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv) to allow trust withdrawals for irradiated fuel management per the updated Irradiated Fuel Management Plan and PSDAR, with prior notice to the NRC);

[56] Letter from David Jaffee, NRC, to C. Lance Terry, TXU Energy, Comanche Peak Steam Electric Station (CPSES), Units 1 and 2 – Issuance of Amendments [No. 103] Re: Deletion of

requirements regarding the form of the decommissioning trust agreement, investment limitations, and 30 days advance written notice to the NRC for trust disbursements or payments.[57] The safety evaluation (SE) accompanying that amendment noted that the licenses of non-electric utility licensees like Comanche Peak had decommissioning trust provisions as license conditions prior to the issuance of the 2002 Decommissioning Trust Rule.[58] The SE found the proposed deletion of the decommissioning trust conditions appropriate because the conditions being deleted were either addressed by the Decommissioning Trust Rule or were no longer needed in light of the Rule and noted the NRC's preference for the efficiency gained by applying a regulation versus case-by-case license conditions.[59] Issuance of the amendment, which also included other changes to the license, was preceded by publication of an environmental assessment (EA) and finding of no significant impact (FONSI) concerning the proposed action.[60]

III. Procedural History

VY is a permanently shut down and defueled nuclear power plant located in Vernon, Vermont, and is in the process of decommissioning.[61] Entergy (along with Entergy Nuclear Vermont Yankee, LLC) is a licensee and holder of Renewed Facility Operating License No. DPR-28 for VY, which expires on March 21, 2032.[62] Entergy certified that VY permanently

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(footnote continued . . .)

Unnecessary License Conditions and Reporting Requirements (TAC Nos. MB5770 and MB577) (May 15, 2003) (ADAMS Accession No. ML031350770) (CPSES Amendment 103).

[57] *See* CPSES Amendment 103, Enclosure 3, Safety Evaluation at 2-3.

[58] *See id*. at 2.

[59] *Id*. (citing Decommissioning Trust Rule, 67 Fed. Reg. at 78,334).

[60] *See id*. at 6 (citing TXU Generation Company, LP; Comanche Peak Steam Electric Station, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact, 67 Fed. Reg. 72,984 (Dec. 9, 2002).

[61] Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 24,291 (Apr. 30, 2015).

[62] Renewed Operating License No. DPR-28 (ADAMS Accession No. ML052720265).

ceased licensed power operations on December 29, 2014, and that permanent removal of fuel from the VY reactor vessel was completed on January 12, 2015.[63] As a result of the docketing of those certifications, as provided in 10 C.F.R. § 50.82(a)(2), VY is no longer authorized to operate or to have fuel in its reactor vessel, but Entergy retains the authority to possess the facility and to possess irradiated nuclear fuel, which is currently stored onsite in the VY irradiated spent fuel pool (SFP) and independent spent fuel storage installation (ISFSI). [64]

By application dated September 4, 2014 (submitted while VY was still operating), Entergy requested an amendment to delete license conditions that impose specific requirements concerning its decommissioning trust agreement, indicating that it was opting to delete the decommissioning trust license conditions and conform instead to the financial assurance terms required by 10 C.F.R. § 50.75(h), as specifically contemplated by 10 C.F.R. § 50.75(h)(5) and the finding of no significant hazards considerations for such amendments in § 50.75(h)(4).[65] The decommissioning trust fund conditions that Entergy proposes to delete were included in the VY license pursuant to the Order Approving the Transfer of the License and Conforming Amendment, issued May 17, 2002 (License Transfer Order)[66] prior to the promulgation of the December 2002 Decommissioning Trust Rule. Those conditions are set forth in paragraph 3.J of the license and, *inter alia*, prohibit trustee payments or disbursements from the fund without a prior written, 30-day notice, to the NRC and prohibit disbursements or payments if the NRC objects in writing.[67]

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[63] Letter from Christopher J. Wamser Site Vice President, Entergy, to NRC, Certifications of Permanent Cessation Power Operations and Permanent Removal of Fuel from the Reactor Vessel, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan. 12, 2015) (ADAMS Accession No. ML15013A426).

[64] 80 Fed. Reg. at 24,291.

[65] LAR Transmittal Letter at 1.

[66] Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station); Order Approving Transfer of License and Conforming Amendment, 67 Fed. Reg. 36,269 (May 23, 2002) (License Transfer Order).

[67] Renewed Operating License No. DPR-28 at 6-8.

Subsequent to submitting the LAR, on January 6, 2015, Entergy requested exemptions from the requirements in 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8) that limit DTF disbursements to only decommissioning expenses and require the NRC be provided advance written notice (of 30 working days) of disbursements for other than decommissioning expenses (Exemption Request).[68] If granted, the Exemption Request would allow, without any prior notice, Entergy to use a portion of the VY DTF for the management of irradiated fuel, consistent with the VY Updated Irradiated Fuel Management Program and PSDAR.[69] There is no mention of the Exemption Request in the LAR.

A notice of opportunity for hearing concerning the licensee's LAR to delete the specific decommissioning trust agreement license conditions was published in the *Federal Register,* and indicated that Entergy was opting "to delete license conditions relating to the terms and conditions of decommissioning trust agreements and, instead, conform [ ] to . . . regulations adopted" in 2002, as contemplated by the provisions of 10 C.F.R. § 50.75(h)(5).[70] The notice included a proposed no significant hazards considerations (NSHC) determination, stating in part that the requested deletion of certain decommissioning trust agreement conditions in Section 3.J of the VY license is "consistent with the types of license amendments permitted in 10 CFR 50.75(h)(5)."[71]

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[68] Entergy Letter BVY 15-002, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28, Attachment 1, at 2 (Jan. 6, 2015) (ADAMS Accession No. ML15013A171) (Exemption Request).

[69] Entergy Letter BVY 14-078, Post Shutdown Decommissioning Activities Report, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Dec. 19, 2014) (ADAMS Accession No. ML14357A110) (VY PSDAR).

[70] Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8355, 8359 (Feb. 17, 2015) (Notice) (citing 67 Fed. Reg. at 78,332).

[71] *Id.* at 8359.

Vermont timely filed its intervention petition by April 20, 2015, the deadline stated in the notice.[72] Vermont seeks to litigate four contentions, which assert that (1) the LAR involves significant safety and environmental hazards, fails to show compliance with 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(B) and (C), and fails to provide adequate protection of public health and safety,[73] (2) the LAR is untimely because it was filed 12 years after the issuance of the Decommissioning Trust Rule and Entergy has not satisfied the timeliness requirements for petitions for reconsideration and motions for filing new or amended contentions after the deadline at 10 C.F.R. §§ 2.345 or 2.309, respectively,[74] (3) the LAR must be considered with the Exemption Request because the exemption, if granted, would not provide reasonable assurance of adequate protection of public health and safety,[75] and (4) the LAR should be denied because Entergy did not submit an environmental report as allegedly required by 10 C.F.R. §§ 51.53(d) and 51.61 and because the Staff's environmental review, as allegedly required by 10 C.F.R. §§ 51.20, 51.70 and 51.101, is not complete or categorically excluded under 10 C.F.R. § 51.22(c).[76] Vermont attached its March 6, 2015, PSDAR comments (Exhibit 1),[77] the VY Master Trust Agreement (MTA) (Exhibit 2), and sworn declarations attesting to and affirming the Vermont PSDAR comments by Vermont Department of Health officials Dr. William Irwin (Irwin Declaration) and Mr. Anthony Leshinskie (Leshinskie Declaration) as well as a statement of professional qualifications for each official. Vermont asserts that the attached

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[72] *Id*. at 8355.

[73] *See* Petition at 3-17.

[74] *See id*. at 17-20.

[75] *See id.* at 20-26.

[76] *See id.* at 26-31.

[77] A notice of availability, request for comments, and of a February public meeting on the PSDAR was published in the *Federal Register.* Entergy Nuclear Operations, Inc. Vermont Yankee Nuclear Power Station Post-Shutdown Decommissioning Activities Report, 80 Fed. Reg. 1975 (Jan. 14, 2015). PSDAR comments were to be submitted by March 23, 2015. *Id.* A copy of the slides presented at the public meeting and a transcript of the meeting is in a package available via ADAMS Accession No. ML15082A327.

comments are "deemed repeated verbatim" as supporting evidence for Contentions I and IV[78] and argues that the LAR should be rejected for the reasons stated in the Petition and the "expressly incorporated Vermont PSDAR Comments.[79]

On May 1, 2015, an Atomic Safety and Licensing Board (Board) was established to preside over this proceeding on the LAR.[80]

DISCUSSION

I. Applicable Legal Standards

A. Standing Requirements

The Commission's regulations in 10 C.F.R. § 2.309 require that an intervention petitioner demonstrate standing to intervene and proffer an admissible contention before it can be admitted as a party to a licensing proceeding. Generally, in order to establish standing to intervene, a petitioner must show it has an interest that may be adversely affected by the proceeding.[81] However, a State that seeks to participate as an intervenor in a "proceeding [that] pertains to a production or utilization facility . . . located within the boundaries of the State" is not required to provide any further demonstration of standing."[82] Because VY, a utilization facility,[83] is located within the boundaries of Vermont, Vermont has standing to intervene in this proceeding.[84]

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[78] *See* Petition at 7, 24.

[79] *Id*. at 31.

[80] Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Establishment of Atomic Safety and Licensing Board, 80 Fed. Reg. 26,301 (May 7, 2015).

[81] The regulations at 10 C.F.R. §§ 2.309(a) and (d) provide the general standing requirements.

[82] 10 C.F.R. § 2.309(h)(1)-(2).

[83] "Utilization facility" is defined, in part, as "[a]ny nuclear reactor other than one designed or used primarily for the formation of plutonium or U-233." 10 C.F.R. § 50.2.

[84] 10 C.F.R. § 2.309(f)(h)(2). *See, e.g., Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 144 (2006) (finding that the Vermont Department of Public Service automatically has standing in a proceeding

B. Contention Admissibility Requirements

Even when a petitioner has established standing, it cannot be admitted as a party to the proceeding unless it proffers at least one admissible contention (*i.e.*, a contention that meets the requirements in 10 C.F.R. § 2.309(f)).[85] A proposed contention is admissible under 10 C.F.R. § 2.309(f) only if it:

> (i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . .;
>
> (ii) Provide[s] a brief explanation of the basis for the contention;
>
> (iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate[s] that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . .[86]

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[87] The Commission has stated that it "should not have to expend resources to support

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(footnote continued . . .)

concerning Vermont Yankee, which is located within the boundaries of the State of Vermont), *rev'd in part on other grounds*, CLI-07-16, 65 NRC 371 (2007).

[85] 10 C.F.R. § 2.309(a).

[86] 10 C.F.R. § 2.309(f)(1).

[87] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (Final rule).

the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing" as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.[88] Thus, the Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) requirements are "strict by design."[89] The failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention[90] and attempting to satisfy these requirements by "[m]ere 'notice pleading' does not suffice."[91]

Pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues beyond the scope of the proceeding as dictated by the Commission's hearing notice.[92] Thus, a proposed contention that challenges a license amendment must confine itself to "health, safety or environmental issues fairly raised by [the license amendment]."[93] The adequacy of the Staff's review, as opposed to the adequacy of the application, cannot be challenged.[94] Moreover, a Board lacks the authority to supervise the Staff's review.[95]

Pursuant to 10 C.F.R. § 2.309(f)(2), contentions must be based on documents or other information available at the time the petition is filed. If a petitioner seeks to raise issues under

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[88] *Id*.

[89] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-01, 55 NRC 1 (2002).

[90] *Private Fuel Storage, L.L.C.* (Independent Irradiated fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[91] *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

[92] *See Public Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

[93] *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

[94] *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493 n.56 (2010) ("The contention . . . inappropriately focused on the Staffs [sic] review of the application rather than upon the errors and omissions of the application itself. Such challenges are not permitted in our adjudications."); *See, e.g.*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009); 69 Fed. Reg. at 2202.

[95] *See Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-12-4, 75 NRC 154, 156 (2012), *citing* LBP-11-30, 74 NRC 627, 632-633 (2011).

the National Environmental Policy Act of 1969, as amended (NEPA),[96] it must file contentions based on an applicant's environmental report, but may file a new or amended contention after the 10 C.F.R. § 2.309(b) deadline for filing its intervention petition based on, for example, a draft or final NRC EIS, or any supplement to those documents, if the contention complies with 10 C.F.R. § 2.309(c) requirements.

Additionally, a proposed contention must be rejected if it challenges NRC regulations because such a challenge is necessarily beyond the scope of the proceeding[97] unless (1) the proponent of the contention petitions for the waiver of the rule in the particular proceeding, (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that the application of the specific rule would not serve the purposes for which the rule was adopted and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.[98] However, if the presiding officer determines that the petitioning participant has not made the required *prima facie* showing, "no evidence may be received on [the] matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter."[99] Instead, the participant may challenge the rule by filing a petition for rulemaking under 10 C.F.R. § 2.802.[100]

Pursuant to 10 C.F.R. § 2.309(f)(1)(iv), a proposed contention must be rejected if it raises an issue that is not material to findings the NRC must make to support the action involved

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[96] National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 *et seq.*

[97] *See Philadelphia Elec. Co*. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974) ("[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process."), *citing Florida Power & Light Co.* (Turkey Point Units No. 3 and 4), 4 AEC 787, 788 (1972). *See also* 10 C.F.R. § 2.335.

[98] *Id*.

[99] 10 C.F.R. § 2.335(c).

[100] 10 C.F.R. § 2.335(e). *See, e.g., Exelon Generation Co., LLC* (Byron Nuclear Station, Units 1 & 2; Braidwood Nuclear Station, Units 1 & 2), CLI-14-6, 79 NRC 445, 448 (2014) ("the proper avenue for challenging an NRC rule is to file a petition for rulemaking").

in the proceeding. The proponent of a proposed contention in a licensing proceeding "must demonstrate that the subject matter of the contention would impact the grant or denial of [the] pending license application."[101] In other words, the issue raised in the proposed contention "must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief."[102]

Pursuant to 10 C.F.R. § 2.309(f)(1)(v), a proposed contention must be rejected if it does not provide a concise statement of the facts or expert opinions that support the proposed contention together with references to specific sources and documents. Neither mere speculation nor bare or conclusory assertions, even by an expert, suffices to allow the admission of a proposed contention.[103] While a Board may view a petitioner's supporting information in a light favorable to the petitioner, if a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions or draw inferences that favor the petitioner, nor may the Board supply the information that a contention is lacking.[104] Additionally, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention.[105] The Board is not expected to sift through attached material

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[101] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

[102] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998), *reconsid. granted in part on other grounds,* LBP-98-10, 47 NRC 288 (1998). *See also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,168 (Aug. 11, 1989) (Final rule) ("[A]dmission of a contention may also be refused . . . if it is determined that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.").

[103] *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[104] *See Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553-54 (2009); *Arizona Pub. Serv. Co*. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI 91-12, 34 NRC 149, 155 (1991).

[105] *See Fansteel,* CLI-03-13, 58 NRC at 204-05.

and documents in search of factual support.[106] Therefore, the Commission "discourage[s] incorporating pleadings or arguments by reference [and] expect[s] briefs . . . to be 'comprehensive, concise, and self-contained.'"[107]

II. Vermont's Proffered Contentions Either Challenge NRC Regulations or Are Inadmissible under 10 C.F.R. § 2.309(f)(1)

A. Contention I Impermissibly Attacks NRC Regulations and Does Not Satisfy the Contention Admissibility Requirements of 10 C.F.R. § 2.309(f)(1)

Contention I states as follows:

> Entergy's LAR involves a potential significant safety and environmental hazard, fails to demonstrate that it is in compliance with 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82 [(a)(8)(i)(B) and (C)], and fails to demonstrate that there will be reasonable assurance of adequate protection for the public health and safety as required by Section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)) if the proposed amendment is approved.[[108]]

In Contention I, Vermont asserts that "it would be arbitrary and an abuse of discretion for the NRC to eliminate the existing 30 day notice requirement for [decommissioning trust fund] withdrawals" and that if granted, the LAR "would directly impair the NRC's ability to ensure compliance with its regulations."[109] Vermont further argues that eliminating the provision would allow Entergy to gain unlimited access to the decommissioning trust fund without giving notice to any interested parties, and that the 30-day notice provision is essential and serves an important safety function by preventing depletion of the decommissioning trust fund to the point where the facility cannot be decommissioned in a safe and environmentally acceptable

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[106] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

[107] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 139 n.41 (2012) (quoting *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 219 (2011)).

[108] Petition at 3 (emphasis omitted).

[109] *Id*. at 3-4.

manner.[110] Vermont also raises various issues with other pending applications and filings by Entergy which Vermont asserts are "inextricably intertwined" with Entergy's LAR.[111]

Contention I is inadmissible because it: (1) impermissibly challenges the Commission's regulations at 10 C.F.R. §§ 50.75(h)(4)-(5) which explicitly permit the modification requested in Entergy's LAR; (2) impermissibly challenges the Commission's regulation at 10 C.F.R. § 50.75(h)(1)(iv) to the extent that Vermont asserts that compliance with the 30-day notification requirement in this regulation is somehow insufficient under the AEA;[112] and (3) fails to meet the contention admissibility standards of 10 C.F.R. § 2.309(f)(1) because it raises issues that are beyond the scope of this proceeding and immaterial, and because it fails to demonstrate that a genuine dispute exists with the application on a material issue of law or fact.

1. Contention I Impermissibly Challenges 10 C.F.R. §§ 50.75(h)(4)-(5)

In its 2002 rulemaking regarding decommissioning trust provisions, the Commission added the provisions in 10 C.F.R. §§ 50.75(h)(1)-(3), which include terms and conditions that the NRC believes are necessary to ensure that funds in the decommissioning trusts will be available for their intended purpose.[113] Prior to the 2002 rulemaking, the NRC imposed decommissioning funding conditions similar to the provisions in 10 C.F.R. §§ 50.75(h)(1)-(3) in individual licenses, including the VY operating license. The Commission enacted the 2002 rule recognizing that "the NRC has always believed that it is preferable and more efficient to adopt standard rules, as opposed to applying specific license conditions on a case-by-case basis."[114]

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[110] *Id*. at 4-6. Contention I, in essence, is a safety contention. To the extent Petitioners raise environmental issues, these arguments are addressed in the Staff's responses to Contentions III and IV. *See infra* Section II.C-D.

[111] Petition at 4-17.

[112] Vermont has not petitioned for a waiver of §§ 50.75(h)(1)(iv), (h)(4), or (h)(5) in this proceeding or identified special circumstances that warrant a waiver as required by 10 C.F.R. § 2.335.

[113] 67 Fed. Reg. at 78,333.

[114] *Id*. at 78,334.

Further, the Commission stated that licensees would have the option of maintaining their existing license conditions or submitting to the new requirements.[115]

Consistent with its position that licensees may delete these license conditions and come into compliance with the new requirements under 10 C.F.R. § 50.75(h), the Commission made a generic determination in § 50.75(h)(4) that, ". . . any amendment to the license of a utilization facility that does no more than delete specific license conditions relating to the terms and conditions of decommissioning trust agreements involves 'no significant hazards consideration.'" In 2003, to clarify that individual licensees have the option of retaining their existing license conditions, the Commission amended the rule to add § 50.75(h)(5),[116] which states:

> The provisions of paragraphs (h)(1) through (h)(3) of this section do not apply to any licensee that as of December 24, 2003, has existing license conditions relating to decommissioning trust agreements, so long as the licensee does not elect to amend those license conditions. If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.

Consistent with § 50.75(h)(5), Entergy's LAR elects to submit to the requirements of 10 C.F.R. § 50.75(h) by deleting those portions of License Condition 3.J currently incorporated in the VY operating license related to decommissioning trust funds, but addressed in § 50.75(h).[117] Entergy's LAR is explicitly contemplated and permitted by §§ 50.75(h)(4)-(5), which allow licensees to delete license conditions relating to decommissioning trust agreements so long as the license remains in accordance with §§ 50.75(h)(1)-(3). Therefore, Contention I impermissibly challenges the Commission's regulations at 10 C.F.R. §§ 50.75(h)(4)-(5).

Vermont also argues that § 50.75(h)(4) does not apply because the proposed amendment does not merely eliminate a requirement in the license that Entergy comply with the

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[115] *Id*. at 78,335.

[116] 68 Fed. Reg. at 65,387.

[117] LAR Transmittal Letter at 1; LAR Transmittal Letter, Attachment 1, at 1-6.

trust agreement, but also eliminates an existing license condition that requires a 30-day notice before withdrawal of funds.[118] Vermont's assertion has no basis. Section 50.75(h)(4) applies to "any amendment to the license of a utilization facility that does no more than delete specific license conditions relating to the terms and conditions of decommissioning trust agreements." The 30-day notice requirement in the VY operating license that Entergy seeks to delete states that the "decommissioning trust agreement must provide that no disbursement be made" without 30-days notice.[119] Thus, Entergy's LAR specifically seeks to delete a license condition "relating to the terms and conditions of decommissioning trust agreements." Therefore, Vermont's assertion does not support admission of Contention I.

The Commission's regulations cannot be challenged in an individual license amendment proceeding without a waiver of the regulations,[120] and Vermont has not petitioned for such a waiver in this proceeding or identified special circumstances that warrant a waiver. Accordingly, Contention I is inadmissible because it impermissibly challenges the Commission's regulations at 10 C.F.R. §§ 50.75(h)(4)-(5).[121] Vermont is attempting to continue to impose a license condition that the NRC regulations allow to be deleted.[122]

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[118] Petition at 4.

[119] LAR Transmittal Letter, Attachment 1 at 4.

[120] 10 C.F.R. § 2.335.

[121] *See Peach Bottom*, ALAB-216, 8 AEC at 20 ("[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process.").

[122] *See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-4, 81 NRC __, __ (Jan. 28, 2015) (slip op. at 13) (A contention "seek[ing] to impose a requirement more stringent than the requirement imposed" by regulation is "an impermissible collateral attack on a regulation in derogation of 10 C.F.R. § 2.335(a) and must be rejected as inadmissible.").

2. Contention I Impermissibly Challenges 10 C.F.R. § 50.75(h)(1)(iv)

In Contention I, Vermont appears to take issue primarily with the "elimination" of the condition requiring a 30-day notice before the withdrawal of funds.[123] Contrary to Vermont's assertions, the LAR would not entirely eliminate the 30-day notice requirement, but would instead require compliance with 10 C.F.R. § 50.75(h)(1)(iv), which requires 30 working days notice before certain withdrawals are made from the DTF;[124] the notice requirement is simply less restrictive for licensees who have begun decommissioning.

For example, the VY operating license requires, in part, that the trustee provide 30 days written notice to the NRC of any intended disbursements from the VY decommissioning trust fund except for disbursements for payments of ordinary administrative expenses.[125] On the other hand, § 50.75(h)(1)(iv) requires, in part, that non-electric-utility licensees provide 30 working days written notice to the NRC of any intended disbursements from their decommissioning trust funds except for disbursements made under 10 C.F.R. § 50.82(a)(8) after decommissioning has begun or disbursements for payments of ordinary administrative costs and other incidental expenses of the fund in connection with the operation of the fund. The requirements of § 50.75(h)(1)(iv) are less restrictive than the requirements of the VY operating license because the regulation does not require prior NRC written notification of 10 C.F.R. § 50.82(a)(8) disbursements after decommissioning has begun.

Vermont asserts that the more stringent 30-day notice provision currently in the VY license condition is necessary to allow Vermont, the public, and the NRC to analyze whether the

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[123] Petition at 3, 4.

[124] LAR Transmittal Letter, Attachment 1, at 1-2, 4.

[125] *Id*., at 1, 4; Letter, NRC to Michael A. Balduzzi, Senior Vice President and Chief Nuclear Officer, Vermont Yankee Nuclear Power Corporation, Vermont Yankee Nuclear Power Station - Issuance of Amendment Re: Transfer of Ownership and Operating Authority Under Facility Operating License to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (TAC No. MB5291), Enclosure 1 at 8 (July 31, 2002) (ADAMS Accession No. ML022100395).

intended withdrawal is for authorized purposes.[126] Vermont further contends that the 30-day notice provision is essential and serves an important safety function by preventing depletion of the DTF to the point where the facility cannot be decommissioned in a safe and environmentally acceptable manner.[127] However, to the extent Vermont is asserting that the notification requirements in the regulation are insufficient, Vermont impermissibly challenges the Commission's regulation at § 50.75(h)(1)(iv) because those notification requirements were explicitly contemplated and approved by the Commission when it promulgated the rule.

In fact, the proposed rule contained a notice provision similar to the more restrictive provision in the VY operating license, requiring a 30-day notification for all disbursements except for ordinary administrative expenses.[128] However, the Commission modified the final rule to make the notification requirement less restrictive, agreeing with public comments that the 30-day notification requirement would potentially cause problems for licensees during the process of decommissioning or decommissioning planning.[129] Moreover, contrary to Vermont's assertion that the LAR would directly impair the NRC's ability to ensure compliance with its regulations and sufficient funding to safely decommission the facility,[130] the Commission specifically recognized that the more restrictive 30-day notification provision would not add any assurances that funding is available, and would duplicate the notification requirements of § 50.82 for a licensee that has commenced decommissioning and submitted its PSDAR.[131]

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[126] Petition at 4, 5.

[127] *Id*. at 4-6.

[128] The proposed version of 10 C.F.R. § 50.75(h)(1)(iii) stated, in part, "No disbursement or payment may be made from the trust . . . other than for payment of ordinary administrative expenses, until written notice of the intention to make a disbursement or payment has been given [to the NRC], at least 30-days prior to the date of the intended disbursement or payment." 66 Fed. Reg. at 29,250.

[129] 67 Fed. Reg. at 78,335. Commenters raised several concerns regarding the 30-day notification provision in the proposed rule including that "[t]he 30-day disbursement notification would be a major burden on licensees during decommissioning and even during decommissioning planning because notifications would be required frequently." *Id*.

[130] *See* Petition at 3-4, 6.

[131] 67 Fed. Reg. at 78,335.

Thus, the Commission explicitly determined that a 30-day notification requirement for withdrawals from the decommissioning trust fund for decommissioning expenses should not be required for withdrawals made under 10 C.F.R. § 50.82(a)(8)[132] by licensees who have begun decommissioning.[133]

For these reasons, and because Vermont has not petitioned for a waiver of 10 C.F.R. § 50.75(h)(1)(iv) in this proceeding or identified special circumstances that warrant a waiver, Contention I constitutes an impermissible challenge to the Commission's regulations and therefore is not admissible.[134]

3. Contention I Does Not Does Not Satisfy the Requirements of 10 C.F.R. § 2.309(f)(1)

In Contention I, Vermont also asserts that Entergy's LAR is inextricably intertwined with other pending applications and filings that it disputes including: (1) Entergy's January 6, 2015, exemption request; (2) the Master Trust Agreement (MTA) between Entergy and Mellon Bank; (3) Vermont Public Service Board (PSB) Orders; and (4) Entergy's PSDAR.[135] However, this license amendment proceeding is not the proper forum for Vermont to dispute any of these items because the scope of this proceeding, as noticed in the *Federal Register*, is limited to the issues raised in Entergy's LAR, which requests the deletion of license conditions.[136] For these

[132] The regulation in 10 C.F.R. § 50.82(a)(8), provides that decommissioning funds may be used so long as they are for legitimate decommissioning activities as defined in 10 C.F.R. § 50.2. These activities do not include irradiated fuel management.

[133] 67 Fed. Reg. at 78,335 (noting that the final rule was modified such that licensees who have complied with 10 C.F.R. § 50.82(a)(4) and submitted a PSDAR would be exempt from restrictions on disbursements).

[134] 10 C.F.R. § 2.335. *See Peach Bottom*, ALAB-216, 8 AEC at 20.

[135] In Contention I, Vermont also challenges Entergy's compliance with 10 C.F.R. §§ 50.82(a)(8)(i)(B) and (C). This challenge should be brought as part of an enforcement proceeding under 10 C.F.R. § 2.206; it is impermissible in this license amendment proceeding. *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 80 NRC 167, 174-75 (2014). The Staff's response to similar arguments regarding Entergy's compliance with §§ 50.82(a)(8)(i)(B) and (C) is addressed below in the response to Contention III. *See infra* Section II.C.

[136] Vermont also states on numerous occasions that its comments on the PSDAR submitted to the NRC on March 6, 2015, *see* Vermont Exhibit 1, and the Leshinskie Declaration and the Irwin

reasons, and as discussed in detail below, Vermont's assertions do not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), and thus do not support admission of Contention I.

a. Vermont Impermissibly Challenges Entergy's Exemption Request Regarding Irradiated Fuel Management in this Proceeding

Vermont asserts that Entergy's estimate of the costs of irradiated fuel management are based on indefensible and undefended assumptions and that Entergy has failed to demonstrate that there will be sufficient funds for decommissioning if these costs exceed Entergy's projections.[137] Vermont further argues that Entergy has not demonstrated that withdrawal of funds for irradiated fuel management would leave the decommissioning trust fund in compliance with §50.82(a)(8)(i).[138] However, Vermont's assertions impermissibly challenge Entergy's January 6, 2015, exemption request related to the withdrawals from the decommissioning trust fund for irradiated fuel management, not the September 4, 2014 LAR at issue in this proceeding.

As explained above, Entergy's LAR requests the deletion of license condition 3.J, which would allow Entergy to comply with the requirements of 10 C.F.R. § 50.75(h), as permitted by 10 C.F.R. §§ 50.75(h)(4)-(5). Separately from and subsequent to Entergy's LAR, Entergy

(footnote continued . . .)

Declaration attesting to and affirming these comments are incorporated by reference in its Petition. Petition at 2, 9, 27, 28, 31. Vermont's PSDAR comments and the supporting declarations of Leshinskie and Irwin are outside the scope of this proceeding which has to do with a separate and distinct LAR and not the VY PSDAR and, therefore, the Board should disregard them. The Board should also disregard them because the Commission "discourage[s] incorporating pleadings or arguments by reference [and] expect[s] briefs . . . to be 'comprehensive, concise, and self-contained.'" *Pilgrim*, CLI-12-3, 75 NRC at 139 n.41 (quoting *Vogtle*, CLI-11-8, 74 NRC at 219).

[137] Petition at 5. Vermont makes a similar argument more fully in Contention III. In response to Contention III, the Staff explains that Vermont's assertions regarding potential insufficiency of funds lacks a factual basis. *See infra* Section II.C.

[138] Petition at 6. Vermont also makes a similar argument in Contention III. The argument is speculative and lacks a basis in fact and law. *See infra* Section II.C.

requested exemptions from 10 C.F.R. §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A).[139] This exemption request would allow Entergy to use a portion of the funds from the VY decommissioning trust fund for the management of irradiated fuel and would allow those disbursements to be made without prior notice. Entergy requested the exemption pursuant to 10 C.F.R. § 50.12, which authorizes the Commission to grant exemptions from the requirements of the regulations of 10 C.F.R. Part 50. The exemptions must be authorized by law, may not present an undue risk to the public health and safety, and must be consistent with the common defense and security.[140] Additionally, under 10 C.F.R. § 50.12, exemptions may only be granted under certain special circumstances.[141]

Contentions I and III include challenges to Entergy's exemption request. However, Vermont may not challenge Entergy's exemption request in this proceeding, which concerns Entergy's LAR. Indeed, neither the AEA nor the Commission's Rules of Practice provide third parties with a right to an adjudicatory hearing on an exemption request.[142] For example, in *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), the Commission denied hearing requests challenging exemptions related to physical security at decommissioning reactors.[143] The Commission held that the exemption request did not amend the Zion license and that "there is no right to request a hearing" to challenge "an exemption from

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[139] Exemption Request at 1.

[140] 10 C.F.R. § 50.12(a)(1).

[141] 10 C.F.R. § 50.12(a)(2) (listing special circumstances, including: when application of the rule would conflict with other NRC requirements; when application of the rule would not serve the rule's underlying purpose; when compliance with the rule would result in undue hardship on the licensee; when an exemption would result in a benefit to the public health that would compensate for any decrease in safety caused by the exemption; temporary exemptions; or when the exemption would serve the public interest.).

[142] Atomic Energy Act of 1954, as amended, § 189.a.(1)(A), 42 U.S.C. § 2239(a)(1)(A) (listing NRC licensing action that give rise to hearing rights); *Brodsky v. NRC*, 578 F.3d 175, 180 (2d Cir. 2009) (citing 42 U.S.C. § 2239(a)(1)(A)) (holding that exemption requests do not give rise to hearing rights).

[143] *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 96–97 (2000).

NRC regulations."[144] Hearing rights to exemptions only attach when the exemption is requested during an ongoing licensing proceeding, and the exemption is essential to the applicant's licensability.[145]

Here, a decision of whether to grant the LAR is not material to not whether Entergy should be exempted from §§ 50.75(h) or 50.82 requirements. If the LAR is granted, Entergy would still need an exemption to obtain relief from the requirements of §§ 50.75(h)(1)(iv) and 50.82(a)(8)(i)(A). Moreover, the scope of this proceeding is defined by the *Federal Register* notice, which limits this proceeding to the LAR.[146] Thus, to the extent Vermont contests Entergy's exemption request in Contentions I and III, those contentions raise issues beyond the scope of this license amendment proceeding. Moreover, because the Commission has not delegated to the Board jurisdiction over Entergy's exemption request, the Board cannot properly rule on the exemption request. In addition, Vermont has not demonstrated how the withdrawal of funds for irradiated fuel management and Entergy's cost estimates are material to the findings the NRC must make to support approval of this LAR. Further, Vermont does not point to any specific pages in the LAR to support its assertions and thus does not raise a genuine dispute with the LAR.

Vermont also argues that if the LAR is granted, the 30-day notice requirement in the VY license condition "will not be replaced with any regulatory requirement of notice for withdrawals for irradiated fuel expenses, let along an equivalent one,"[147] and that such withdrawals are

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[144] *Id.*

[145] *Private Fuel Storage, L.L.C.* (Independent Irradiated fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001).

[146] 80 Fed. Reg. at 24,291; *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790–91 (1985) (explaining that "[t]he various hearing notices are the means by which the Commission identifies the subject matters of the hearings and delegates to the boards the authority to conduct proceedings. Our decisions make clear that licensing boards generally 'can neither enlarge nor contract the jurisdiction conferred by the Commission.'") (quoting *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-225, 8 AEC 645, 647 (1974) (footnotes omitted)).

[147] Petition at 9 (emphasis omitted).

"neither contemplated nor authorized by § 50.75(h)(1)(iv)."[148] Vermont is incorrect. If the LAR is granted, § 50.75(h)(1)(iv) would still require Entergy to provide 30-day notification for withdrawals from the decommissioning trust fund for non-administrative expenses and expenses unrelated to decommissioning, such as for withdrawals for irradiated fuel management.[149] Vermont thus appears again to be challenging Entergy's request for an exemption from the 30-day notification requirement for withdrawals for expenses associated with irradiated fuel management, not Entergy's LAR. Therefore, Vermont's assertions are beyond the scope of this proceeding.

For these reasons, Vermont's assertions do not support the admission of Contention I because they are out of scope, immaterial, and fail to raise a genuine dispute with the application.[150]

b. Vermont's Arguments Regarding the MTA and Vermont's PSB Orders Do Not Support Admission of Contention I

Vermont asserts that the proposed amendment ignores the MTA, which includes the obligation to use the trust funds only for radiological decommissioning activities until all decommissioning is complete.[151] In support of its claim, Vermont references several provisions in the MTA that place restrictions on the use of decommissioning trust funds, require that radiological decontamination be complete before the decommissioning trust fund can be used for irradiated fuel management, and require Entergy to obtain relief from the DOE before using the decommissioning trust fund for irradiated fuel management.[152]

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[148] *Id*. at 6.

[149] *See* 10 C.F.R. § 50.75(h)(1)(iv).

[150] 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), (vi).

[151] Petition at 4, 9.

[152] *Id*. at 11, 13-17.

To the extent that Vermont asserts that using the decommissioning trust fund for irradiated fuel management expenses would violate the terms of the MTA, and that Entergy must obtain relief from the DOE for irradiated fuel management expenses, Vermont has not demonstrated how these arguments are material to the findings NRC must make to approve or deny the LAR. Indeed, Vermont's assertions again appear to challenge Entergy's exemption request related to irradiated fuel expenses, not the LAR. Moreover, while Vermont dedicates several pages of its pleading to specifically reference portions of the MTA, Vermont provides no such references to the LAR itself. To support an admissible contention, Petitioners are required to "include references to specific portions of the application" and "the supporting reasons for each dispute."[153]

Additionally, Vermont's arguments are out of scope. The MTA is a contract between Entergy and Mellon Bank for the purposes of accumulating and holding funds for decommissioning in trust.[154] While the NRC can object to material modifications of the trust agreement that may potentially affect the ability of the trust agreement to provide reasonable assurance of decommissioning funds,[155] the scope of this license amendment proceeding is limited to the issues raised in Entergy's LAR, as noticed in the *Federal Register.* Thus, this license amendment proceeding is not the proper forum for Vermont to dispute Entergy's compliance with the irradiated fuel management terms in the MTA.

Vermont also asserts that Entergy's LAR ignores Entergy's obligation, pursuant to Vermont PSB Orders, to seek the PSB's approval before using decommissioning trust funds in ways that are not allowed under the MTA.[156] In support of this argument, Vermont notes that its

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[153] 10 C.F.R. § 2.309(f)(1)(vi).

[154] MTA at 1, 5.

[155] 10 C.F.R. § 50.75(h)(1)(iii). Section 50.75(h)(1)(iii) also provides that if the MTA is amended in any material respect, Entergy would be required to provide written notification to the NRC 30 working days prior before the proposed effective date of any amendment to the MTA.

[156] Petition at 4.

ratepayers have an existing 55% interest in any leftover funds, an interest that is addressed in the MTA and required under several PSB Orders.[157] However, Vermont provides no explanation as to how the PSB Orders are material to the findings the NRC must make on the LAR at issue in this proceeding. Moreover, the NRC is not authorized by law to enforce the Vermont PSB Orders. Finally, to the extent that Vermont disputes the sufficiency of the decommissioning trust fund, these assertions fall outside the scope of this license amendment proceeding, which is limited to § 50.75(h) and the deletion of the DTF license conditions.

Accordingly, Vermont's arguments regarding Entergy's compliance with the MTA and Vermont PSB Orders do not support admission of Contention I because they are out of scope, immaterial, and fail to raise a genuine dispute with the LAR.[158]

c. Vermont's Arguments Regarding the PSDAR and Sufficiency of the DTF Do Not Support Admission of Contention I

Vermont argues that the LAR is inextricably intertwined with Entergy's PSDAR, the financial calculations of which form the basis for Entergy's assertion that the excess funds from the decommissioning trust fund to spend on irradiated fuel management will exist.[159] However, Vermont's assertions impermissibly challenge the sufficiency of Entergy's exemption request regarding withdrawals from the decommissioning trust fund for irradiated fuel management expenses, not the LAR.[160]

Vermont also references its March 6, 2015 comments on Entergy's PSDAR and notes several expenses that the State believes fail to meet the NRC's definition of decommissioning.[161] Vermont asserts that improper use of the decommissioning trust fund

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[157] *Id*. at 11-13.

[158] 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), (vi).

[159] Petition at 6.

[160] *See* discussion *supra* Section II.A.3.a.

[161] Petition at 9-10; Irwin Declaration at ¶¶ 6, 8 (discussing additional alleged deficiencies with the PSDAR and challenging the sufficiency of the DTF).

"places Vermonters and neighboring citizens at risk that the site will not be fully radiologically decontaminated."[162] However, Vermont's assertions do not support admission of Contention I. First, Vermont's assertions are immaterial because the cited expenses are unrelated to the findings the NRC must make to approve the LAR. Second, although Vermont references items in Entergy's PSDAR to support its argument that these expenses are inappropriate, Vermont provides no specific references to the LAR itself and thus fails to demonstrate any genuine dispute with the LAR. Third, the sufficiency of Entergy's PSDAR and DCE are outside the scope of this license amendment proceeding. To the extent Vermont believes that Entergy is not in compliance with NRC regulations, the proper recourse would be to file a § 2.206 petition requesting an enforcement action.[163] Accordingly, Vermont's assertions regarding the PSDAR and PSDAR comments at Vermont Exhibit 1, and the declarations of Leshinskie and Irwin attesting to and affirming these comments do not support admission of Contention I because they are out of scope, immaterial, and fail to raise a genuine dispute with the application.[164]

B. Contention II Is Inadmissible

In proposed Contention II, Vermont asserts that, "Entergy's proposed amendment is untimely."[165] This proposed contention is inadmissible because the timeliness of the LAR is not material to the findings the NRC must make to approve or deny the application. Moreover, Vermont has not provided any alleged facts or law to support its position that an amendment to delete decommissioning trust agreement license conditions and conform instead to the Commission's regulations at 10 C.F.R. § 50.75(h) is somehow limited in time.

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[162] *Id*. at 3-4.

[163] *St. Lucie Plant*, CLI-14-11, 80 NRC at 174 (stating that "neither licensee activities nor NRC inspection of (or inquiry about) those activities provides the opportunity for a hearing under the AEA because those activities only concern compliance with the terms of an existing license" and that the appropriate means to challenge licensee actions is through a petition under 10 C.F.R. § 2.206).

[164] 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), (vi).

[165] Petition at 17 (emphasis omitted).

Vermont challenges the LAR to the extent that it requests to change the requirements applicable to VY from the current VY operating license conditions, which require 30-days prior written notification of all decommissioning trust fund disbursements, to 10 C.F.R. § 50.75(h), which does not require prior written notification of 10 C.F.R. § 50.82(a)(8) disbursements after decommissioning has begun. Vermont asserts that it is "clear that an application for an LAR to substitute license conditions with the provisions of [10 C.F.R.] § 50.75(h) should have been made at the time the regulation was adopted."[166] Vermont bases this assertion on the fact that 10 C.F.R. § 50.75(h)(5) became effective on December 24, 2003,[167] and on the fact that 10 C.F.R. § 50.75(h)(5) states that, "[t]he provisions of paragraphs (h)(1) through (h)(3) of this section do not apply to any licensee that as of December 24, 2003, has existing license conditions relating to decommissioning trust agreements…."

These facts do not satisfy the 10 C.F.R. § 2.309(f)(1)(v) contention admissibility requirement for *supporting* facts or expert opinions because they do not support Vermont's argument. On the contrary, the plain language of 10 C.F.R. § 50.75(h)(5) provides that December 24, 2003, is the deadline for the existence of decommissioning license conditions and not a deadline for requests to delete these license conditions. Furthermore, Vermont does not point to anything in the statements of consideration for the 10 C.F.R. § 50.75(h)(5) rulemaking to support its timeliness argument other than the effective date of the regulation. However, a regulation's effective date is just that: the date on which it becomes effective; thus, it is a beginning-date for a regulation, not an end-date for its utilization. Also, instead of setting a specific date by which it must be utilized, 10 C.F.R. § 50.75(h)(5) itself states that it is triggered whenever a licensee "elects to amend" its DTF license conditions and places no deadline on

[166] Petition at 19.

[167] 68 Fed. Reg. at 65,386.

when such an election must occur. Therefore, because it lacks support, Vermont's proposed Contention II is inadmissible under 10 C.F.R. § 2.309(f)(1)(v).

Vermont also argues, without citing any precedent, that Entergy was required to submit its LAR as a "petition to reconsider" the May 17, 2002 License Transfer Order approving the transfer of the VY operating license to Entergy and imposing the decommissioning trust fund license conditions.[168] Vermont reasons that, because 10 C.F.R. § 50.75(h) was adopted after this Commission order, the LAR had to be filed in a timely fashion after the promulgation of 10 C.F.R. § 50.75(h) based on the criteria in 10 C.F.R. § 2.309(c)(1).[169]

These arguments similarly do not support Vermont's proposed Contention II. Although an operating license is transferred by Commission order, along with any required new license conditions, any subsequent amendments to such an operating license are done in the same manner as would be done for any other operating license. According to 10 C.F.R. § 50.90, "[w]henever a holder of . . . [an] operating license . . . desires to amend the license . . . , application for an amendment must be filed with the Commission . . . fully describing the changes desired, and following as far as applicable, the form prescribed for original applications." Notably, 10 C.F.R. § 50.90 does not make any mention of timeliness. Moreover, it does not distinguish between transferred operating licenses versus all other operating licenses or between operating license conditions created as a result of a license transfer versus all other operating license conditions.

All amendments to operating licenses are governed by 10 C.F.R. § 50.90, which does not include a timeliness requirement. Conversely, the Commission's regulations regarding petitions for reconsideration at 10 C.F.R. § 2.345 and motions to file new or amended contentions after the deadline at 10 C.F.R. § 2.309(c) have nothing to do with requests for the

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[168] Petition at 18.

[169] *Id*.

NRC to amend operating licenses, but, instead are part of the rules governing NRC adjudicatory hearings. Although a 10 C.F.R. § 50.90 application for a license amendment gives rise to an opportunity for an adjudicatory hearing, the amendment itself is not requested through an adjudicatory hearing. Thus, Vermont's improper conflation of these separate processes does not support its timeliness argument.

In addition, Vermont asserts that Entergy acted improperly in waiting until now to take advantage of 10 C.F.R. § 50.75(h)(5). Vermont alleges that this action amounts to Entergy "switch[ing] over to [10 C.F.R. § 50.75(h)] at the very moment [that it became] more lenient than the license conditions."[170] But this is not the case. Section 50.75(h) has always provided that licensees do not have to provide prior notification of 10 C.F.R. § 50.82(a)(8) disbursements after decommissioning has begun and the VY license conditions have always provided that prior notification is required for all disbursements. The fact that Entergy has decided to pursue this amendment at about the same time that it has begun decommissioning does not demonstrate some sort of wrong-doing on Entergy's part and to the extent that Vermont suggests that that is the case, Vermont's suggestion is speculative. Instead, such timing could be attributed to a licensee not amending its license until doing so is actually needed or necessary after its decision to initiate the decommissioning process. Therefore, again, Vermont's assertions do not provide the support necessary to demonstrate that its proposed Contention II is admissible.

Finally, Vermont argues that it and its citizens have relied on Entergy continuing to adhere to the VY license condition requiring prior notification for 10 C.F.R. § 50.82(a)(8) disbursements after decommissioning has begun and that a change from this requirement now to the 10 C.F.R. § 50.75(h) requirements would be "late and prejudicial to Vermont."[171] Vermont states that the VY decommissioning trust agreement license conditions are critical to protect its

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[170] *Id*. at 19-20.

[171] *Id*. at 17-18.

citizens because they provide an opportunity for Vermont "to step in and protest improper withdrawals from the [DTF] *before* they occur."[172] However, contrary to 10 C.F.R. § 2.309(f)(1)(iv), Vermont has not demonstrated that this alleged expectation is material to the findings the NRC must make to support the LAR. Instead, proposed Contention II is an inadmissible challenge to the Commission's regulations at 10 C.F.R. § 50.75(h).

The NRC has preempted the fields of the construction and operation of production or utilization facilities and the disposal of byproduct, source, or special nuclear material because of the hazards or potential hazards thereof.[173] In its order approving the transfer of the VY operating license to Entergy, the NRC exercised its expertise and found that, with the inclusion of the decommissioning trust agreement license conditions, the transfer of the license to Entergy would not be inimical to the health and safety of the public.[174] Subsequently, in its 10 C.F.R. § 50.75(h) rulemaking, the NRC also found that, although prior notification for disbursements is necessary for the NRC to effectively monitor licensees before decommissioning, it is not necessary for disbursements for decommissioning expenses after decommissioning has begun.[175] Therefore, the NRC has found in its expert capacity that both the VY license conditions and the requirements of 10 C.F.R. § 50.75(h) ensure safety. As a result, Vermont's argument that the VY license conditions, as opposed to the regulations at 10 C.F.R. § 50.75(h), are "critical to protect its citizens"[176] is not material to the findings that the

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[172] *Id*. at 18-19 (emphasis in original).

[173] *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 411 (2nd Cir 2013) (quoting *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 209 (1983)).

[174] Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (TAC No. MB3154), Enclosure 1, at 2-3 (May 17, 2002) (ADAMS Accession No. ML020390198).

[175] 67 Fed. Reg. at 78,335-36. *See also id.* at 78,341-342 (stating that the regulation "explicitly eliminat[es] the requirement to provide advance notification of decommissioning fund expenditures when § 50.82 applies" and that "the rule will not apply to those licensees operating under 10 CFR 50.82"); 10 C.F.R. § 50.75(h)(1)(iv) (excluding notifications "[a]fter decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8)").

NRC must make with respect to the LAR. Ultimately, the role of the NRC is to protect all members of the public. Vermont's proposed Contention II amounts to an inadmissible challenge as to whether 10 C.F.R. § 50.75(h) is sufficient to ensure safety.[177]

C. Contention III Is Inadmissible

In Contention III, Vermont asserts:

> Entergy's proposed amendment must be considered in conjunction with a directly related exemption request because if the exemption request is granted there will not be reasonable assurance of adequate protection of the public health and safety as required by section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)).

While Vermont asserts that the license amendment application and the exemption request are inextricably intertwined,[178] the two are separate actions: in the license amendment application Entergy is opting to be covered by the prior notice provisions of 10 C.F.R. § 50.75(h); in the exemption request it seeks to pay irradiated fuel maintenance expenses with decommissioning trust funds that are not needed to pay for decommissioning expenses. While the license amendment application is subject to a request for hearing, the exemption request is not.

As discussed above in Section II.A.3.a, no hearing rights attach to a request for exemption.[179] The Commission has explained that a right to a hearing only "exists for those actions that are identified in section 189 [of the Atomic Energy Act]".[180] In the *Yankee Atomic Elec. Co.* matter, it rejected a petitioner's request for an adjudicatory hearing regarding decommissioning activities then underway at the site (dismantlement, transportation and burial

(footnote continued . . .)

[176] Petition at 19.

[177] *See* 10 C.F.R. § 2.335(a).

[178] Petition at 20 (emphasis omitted).

[179] *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 (1994).

[180] *Id.*

of radioactive components).[181] The Commission wrote, "the activities that are the subject of the petition are not activities that invoke NRC actions that implicate the hearing rights afforded by section 189a [of the Atomic Energy Act]."[182] Similarly, Vermont's challenge in this proceeding seeks a hearing on a matter for which no hearing is afforded and its contention is thus without a basis in law and inadmissible under 10 C.F.R. § 2.309(f)(1)(vi). Moreover, because Contention III's challenge to the exemption request raises issues that are not within the scope of this license amendment proceeding, the contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).[183]

Contention III is also inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) because it lacks a basis in fact and law in other respects as well. In Contention III, Vermont asserts that Entergy should not be granted an exemption that allows it to use money from the decommissioning trust fund for irradiated fuel maintenance because, as Vermont claims, Entergy has not established that the money in the fund at this point is sufficient to cover decommissioning expenses, "much less that there is an excess of funds that can be used for irradiated fuel maintenance."[184] Vermont also asserts that, in contravention of 10 C.F.R. § 50.82(a)(8)(i)(B), Entergy has failed to provide an assessment of unforeseen expenses that could arise during the SAFSTOR period, including a design basis earthquake, a terrorist attack, an irradiated fuel transfer accident, and flooding.[185] Finally, Vermont points to the recent discovery of strontium-90 in groundwater monitoring wells as evidence that the PSDAR's cost estimate for radiological decontamination must be incorrect because it does not take into account the cost of additional excavation that

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[181] *Id*.

[182] *Id.* at 102 (footnote omitted).

[183] *See* discussion *supra* Section II.A.3.a.

[184] Petition at 20-21.

[185] *Id*. at 21, Irwin Declaration at 2-3.

Vermont asserts will be necessary to address the strontium-90 contamination.[186] Contrary to Vermont's assertions, Entergy has shown that there is sufficient money in the decommissioning trust fund to cover decommissioning expenses; that the events that Vermont cites are not the unforeseen conditions that 10 C.F.R. § 50.82(a)(8)(i)(B) addresses and that these events are, moreover, speculative; and that the claim that the PSDAR cost estimate is incorrect is speculative. In a number of instances, exemptions similar to the exemption requested here have been approved for other facilities undergoing decommissioning.[187]

In its Exemption Request, Entergy stated that the decommissioning trust fund is sufficient to cover decommissioning expenses and that there are sufficient funds in excess of projected decommissioning expenses to pay for a portion of irradiated fuel maintenance.[188] According to Entergy's cash flow analysis, if both decommissioning expenses and certain irradiated fuel maintenance expenses are paid with trust funds, the decommissioning trust fund balance in 2076, at the end of the SAFSTOR decommissioning period, is projected to be the equivalent of $175,915,000 in 2014 dollars.[189] The amount of money Entergy reports in the trust fund as of October 31, 2014 is $654,963,000[190] -- whereas decommissioning expenses are projected to total $817,219,000.[191] However, the current trust fund balance will not be the total amount of money available for decommissioning and irradiated fuel maintenance. Entergy has opted to maintain VY in a safe storage condition (SAFSTOR) for an extended period, up to 60 years, prior to the completion of decommissioning.[192] This option is contemplated by the

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[186] Petition at 22-23; Irwin Declaration at 3-8.

[187] *See supra* notes 54-55 and accompanying text.

[188] Exemption Request, Attachment 1, at 2.

[189] *Id*. at 5.

[190] *Id*. at 3.

[191] *Id*. at 5.

[192] *Id*. at 1.

Commission's regulations.[193] It allows natural radioactive decay to proceed over time, which will reduce the amount of contamination and radioactivity that will have to be addressed in decommissioning and thus reduce the overall expense of decommissioning.[194] The SAFSTOR period also provides time for the trust fund to accrue interest. By regulation, the interest rate that licensees are allowed to use in their funding projections is limited to, at most, a 2% real rate of return.[195] When a 2% real rate of return is applied to the trust fund balance, the trust fund is projected to generate sufficient funds by the end of the decommissioning period to cover both decommissioning and certain irradiated fuel maintenance expenses.[196] Moreover, Entergy's DCE incorporates numerous conservatisms in its calculation of costs and the Commission's regulations require an annual review of expenses and decommissioning funding by both the licensee and the NRC until the license is terminated.[197] Vermont's contention, which does not take into account the effects of SAFSTOR on the trust fund balance and decommissioning expenses, the conservatisms of Entergy's DCE, or Entergy's and the NRC's annual review of these issues, thus lacks a factual basis.[198]

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[193] The regulation in 10 C.F.R. § 50.82(a)(3) requires that "[d]ecommissioning will be completed within 60 years of permanent cessation of operations."

[194] Regulatory Guide 1.184, Rev. 1, *Decommissioning of Nuclear Power Reactors* at 4 (Oct. 2013) (ADAMS Accession No. ML13144A840); NUREG-1628, Final Report, *Staff Responses to Frequently Asked Questions Concerning Decommissioning of Nuclear Power Plants* at 5-7 (June 2000) (ADAMS Accession No. ML003726190).

[195] 10 C.F.R. § 50.75(e)(1)(i).

[196] Exemption Request, Attachment 1, at 5.

[197] 10 C.F.R. § 50.82(a)(8)(i)(C)(v). The DCE utilizes several conservatisms: the use of a contingency factor, a work difficulty factor, the assumption that the DOE will accept older irradiated fuel before it accepts newer irradiated fuel, and an estimate of the volume of soil to be removed for controlled disposal that is not adjusted downward for the natural decay of radionuclides over time. *See* VY PSDAR, Enclosure, Attachment 1 at xiv, Sections 3.2, 3.3, and 3.4.9.

[198] Vermont notes that the regulations do not address the use of the DTF for irradiated fuel management expenses and argues that the requested exemption that would allow that use is inappropriate. Petition at 24-26. However, a Settlement Agreement that Vermont entered into with Entergy specifically contemplates the use of DTF monies for irradiated fuel management expenses and provides for that any reimbursements that Entergy receives for such expenses can be deposited into the DTF. VY PSDAR, Enclosure, Attachment 2, Settlement Agreement, § 11(a). The Settlement Agreement, by its terms, was required to be attached to the VY PSDAR.

The regulation in 10 C.F.R. § 50.82(a)(8)(i)(B), provides that decommissioning trust funds may be used by a licensee if "[t]he expenditure would not reduce the value of the decommissioning trust fund below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise." Vermont asserts that this regulation requires Entergy to consider unforeseen events that could result in increased decommissioning costs, such as a design basis earthquake, a terrorist attack, an irradiated fuel transfer accident, and flooding.[199] However, not only are these events low probability events and highly speculative,[200] they are not the unforeseen events that the regulation addresses. The Commission explained that the unforeseen events that 10 C.F.R. § 50.82(a)(8)(i)(B) is intended to address are those that preclude or delay decommissioning activities such that "decontamination or removal activities are interrupted and the components and equipment involved have to be stored safely at the site."[201] For example, the Commission noted that such events could include a situation where "waste shipments were rejected by the disposal site because of lack of storage space or legal impediments".[202] The Commission described the criterion in 10 C.F.R. § 50.82(a)(8)(i)(B) as "call[ing] for a licensee to show that it can maintain the status quo at a facility and that the proposed activities will not preclude the ultimate unrestricted use of the site."[203] Vermont's contention, which misreads the regulation, thus lacks a basis in law.

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[199] Petition at 21.

[200] NUREG-1628 at 26. *See* The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,207 (Aug. 8, 2008).

[201] Use of Decommissioning Trust Funds Before Decommissioning Plan Approval, Draft Policy Statement, 59 Fed. Reg. 5216, 5217 (Feb. 3, 1994). In the proposed rule, the Commission wrote that it "proposes to codify the position embodied in the draft policy statement". Decommissioning of Nuclear Power Reactors, 60 Fed. Reg. 37,374, 37,376 (July 20, 1995) (Proposed rule). The language of the proposed rule was adopted without change when the final rule was adopted. 61 Fed. Reg. at 39,302.

[202] 59 Fed. Reg. at 5217.

[203] *Id*.

Vermont's assertion that Entergy has underestimated the cost of decommissioning is speculative and thus lacks a basis in fact. Vermont asserts that the DCE fails to take into account the recent discovery of low levels of strontium-90 in water from groundwater monitoring wells at the VY site and, that as a result, Entergy's decommissioning cost estimate is too low.[204] As Vermont's own documents show, however, the level of strontium-90 is well below the drinking water standards set by the Environmental Protection Agency.[205] In its press release, the Vermont Department of Health stated, "[t]he water is not available for consumption, the levels detected are well below the EPA's safe drinking water threshold, and there is no immediate risk to health."[206]

The recent discovery of low level of strontium-90 contamination does not necessarily translate into site remediation costs in excess of those projected by Entergy. The amount of activity and expense required to remediate radiological contamination will not be determined until the end of the decommissioning process and involves complex calculations involving inputs that will not be available for decades.[207] Based on its projections, Entergy expects to terminate its license in 2073.[208] In accordance with 10 C.F.R. § 50.82(a)(9)(i), it must submit a LTP within two years of license termination.[209] Thus, Entergy projects that in 2071 it will submit its LTP. The LTP is required to characterize the radiological contamination at the site and provide a site remediation plan.[210] Based on the site's historical data and site characterization data, Entergy

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[204] Petition at 22-23.

[205] Vermont Department of Health Communications Office, *Strontium-90 Detected in Ground Water Monitoring Wells at Vermont Yankee* (Feb. 9, 2015), *available at* http://healthvermont.gov/news/2015/020915_vy_strontium90.aspx.

[206] *Id.*

[207] NUREG-1628 at 38.

[208] VY PSDAR, Enclosure, Attachment 1 at 8.

[209] The licensee will develop the LTP in accordance with NUREG 1700, Rev. 1, *Standard Review Plan for License Termination Plans* (ADAMS Accession No. ML031270391).

[210] 10 C.F.R. § 50.82(a)(9)(ii).

will develop a final status survey plan to demonstrate that the NRC's radiological release criteria in 10 C.F.R. Part 20, Subpart E will be met.[211] The calculation of the radiation-release criteria is complex: it includes the development of a site-specific dose model that employs all exposure pathways, typically using Argonne National laboratory's RESRAD computer code to determine the Derived Concentration Guideline Levels that will be used in field measurements to demonstrate that the residual radiological release criteria will be met.[212] A final Status Survey Plan will also be developed to ensure that the radiological measurements are technically correct and in accordance with a quality assurance program.[213] Whether and to what extent any current data regarding strontium-90 contamination will affect the radiation-release criteria which will be calculated decades from now and whether and to what extent that calculation will affect the cost of site remediation and thus the ultimate cost of decommissioning cannot be determined at this point. Accordingly, Vermont's assertion that Entergy has underestimated the cost of decommissioning based on the recently discovered strontium-90 contamination is speculative and lacking a basis in fact and thus cannot serve as the basis for an admissible contention.

Finally, Vermont asserts both in Contention I and III, [214] that Entergy has failed to meet the requirements of 10 C.F.R. § 50.82(a)(8)(i)(B) and (C) or has not demonstrated its compliance with those regulations. To the extent that Vermont is asserting that Entergy is in

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[211] 10 C.F.R. § 20.1501, *i.e*. NUREG-1575, Rev. 1, *Multi-Agency Radiation Survey and Site Investigation Manual* (Aug. 2000) (ADAMS Accession Nos. ML003761445 and ML003761454).

[212] *See* NUREG/CR-5512, Vol. 1, Final Report, *Residual Radioactive Contamination From Decommissioning Technical Basis for Translating Contamination Levels to Annual Total Effective Dose Equivalent* (Oct. 1992) (ADAMS Accession No. ML052220317).

[213] NUREG-1575 and NUREG-1757, Vol. 2, Final Report, *Consolidated NMSS Decommissioning Guidance, Characterization, Survey, and Determination of Radiological Criteria* (Sept. 2003) (ADAMS Accession No. ML053260027).

[214] Petition at 5-7, 21 and 23.

violation of these or any other regulations, Vermont cannot raise that issue here; the proper course of action for the State is to bring an enforcement action under 10 C.F.R. §2.206.[215]

D. Contention IV Is Inadmissible

In proposed Contention IV, Vermont asserts that:

> The proposed amendment should be denied because Entergy has not submitted an environmental report as [required] by 10 C.F.R. §§ 51.53(d) and 51.61 and it has not undergone the required NRC staff environmental review pursuant to 10 C.F.R. §§ 51.20, 51.70 and 51.101 and, despite Entergy's claim to the contrary, is not categorically excluded from that review under 10 C.F.R. § 51.22(c). [[216]]

With this proposed Contention, Vermont is seeking to impose on Entergy requirements more stringent than those actually required by the Commission's rules, which amounts to an impermissible collateral attack on those rules and "must be rejected as inadmissible."[217] Contrary to proposed Contention IV, Entergy is not required to submit an environmental report and the NRC is not required to conduct an EA and a FONSI or EIS at the PSDAR stage of decommissioning. Moreover, categorical exclusions are provided for by the Commission's regulations and Vermont's argument against the use of a categorical exclusion with respect to the LAR contradicts the Commission's regulations at 10 C.F.R. § 50.75(h) having to do with decommissioning trust funds. Ultimately, proposed Contention IV is a challenge to the

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[215] *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 23 (2001).

[216] Petition at 26 (emphasis omitted).

[217] *Vermont Yankee*, LBP-15-4, 81 NRC at __ (Jan. 28, 2015) (slip op. at 13) (citing *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79 n.27 (2014); *Seabrook*, CLI-12-5, 75 NRC at 315; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995)).

Commission's categorical exclusions rule,[218] decommissioning trust rule,[219] and decommissioning rule[220] without a waiver of these rules and, as such, should be denied.[221]

In its application, Entergy states that its LAR is "confined to administrative changes for providing consistency with existing regulations" such that it meets the eligibility criterion for categorical exclusion set forth in 10 C.F.R. § 51.22(c)(10) and, consequently, that, pursuant to 10 C.F.R. § 51.22(b), no EIS or environmental assessment needs to be prepared in connection with the LAR.[222] Vermont challenges this statement to the extent that the LAR would eliminate the requirement for prior notification of 10 C.F.R. § 50.82(a)(8) disbursements after decommissioning has begun.[223] Specifically, Vermont argues that the LAR is insufficient because "[NEPA] and applicable NRC regulations require at least some level of environmental review before the NRC acts on matters potentially affecting the environment."[224] Essentially, Vermont is arguing that the potential for a categorical exclusion as raised by Entergy is insufficient because a categorical exclusion is not a "level of environmental review." This argument is contradicted by the Commission, which stated in a categorical exclusions rulemaking that:

> [A] categorical exclusion does not indicate the absence of an environmental review, but rather, that the agency has established a sufficient administrative record to show that the subject actions do not, either individually or cumulatively, have a significant effect on the human environment. Agencies establish sufficient administrative records to support categorical exclusions through the use of professional staff opinions, past NEPA records which show that the agency made a FONSI each time it considered the

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[218] *See* Categorical Exclusions From Environmental Review, 75 Fed. Reg. 20,248 (Apr. 19, 2010) (Final rule).

[219] *See* 67 Fed. Reg. at 78,332.

[220] *See* 61 Fed. Reg. at 39,278

[221] *See* 10 C.F.R. § 2.335.

[222] LAR Transmittal Letter, Attachment 1, at 8.

[223] *See* Petition at 27.

[224] *Id*. at 26.

> action, and the establishment of similar categorical exclusions by other agencies.[225]

Additionally, the Council on Environmental Quality's regulations enacting NEPA explicitly recognize that a categorical exclusion is a generic finding that a category of actions do not individually or cumulatively have a significant effect on the human environment.[226] Therefore, Vermont is incorrect in arguing that a categorical exclusion is somehow not an environmental review under NEPA and that neither Entergy nor the NRC would be in compliance with NEPA if they were to use a categorical exclusion with respect to the instant LAR. Ultimately, the Commission's regulations provide for the potential for such an environmental review for license amendments and Vermont cannot challenge these regulations in this individual licensing proceeding without a waiver of these regulations.[227]

Vermont also argues that the change that it contests (*i.e.*, the elimination of the requirement for prior notification of 10 C.F.R. § 50.82(a)(8) disbursements after decommissioning has begun) does not fall under the NRC's categorical exclusion at 10 C.F.R. § 51.22(c)(10), which excludes, in part, the "amendment to a . . . license . . . which . . .changes recordkeeping, reporting, or administrative procedures or requirements . . . ." Vermont argues that this is because this change would have a "direct substantive effect" and "hinder[] the NRC's and the State's ability to ensure that the [DTF] remains adequate to cover the radiological decommissioning that is necessary to protect public health, safety, and the environment."[228] This argument is essentially an inadmissible challenge to the Commission's regulations at

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[225] 75 Fed. Reg. at 20,251.

[226] *See* 40 C.F.R. § 1508.4. *See also Brodsky v. NRC*, 704 F.3d 113, 119-20 (2nd Cir. 2013) ("Implementing regulations promulgated by the Council on Environmental Quality ("CEQ") permit agencies categorically to exclude certain classes of actions from the EIS requirement on the ground that such actions do not individually or cumulatively have a significant effect on the environment."); *See* 40 C.F.R. §§ 1507.3(b)(2), 1508.4; *see also* 10 C.F.R. § 51.22(c) (establishing categorical exclusions for various NRC actions).

[227] 10 C.F.R. § 2.335.

[228] Petition at 27.

10 C.F.R. § 50.75(h). In direct contrast to Vermont's argument, as part of its 10 C.F.R. § 50.75(h) rulemaking, the Commission found that prior written notifications of 10 C.F.R. § 50.82(a)(8) disbursements after decommissioning has begun are not necessary for the NRC to effectively monitor licensees.[229] Moreover, 10 C.F.R. § 50.75 indicates that such a prior written notification requirement could be a categorically excluded "reporting" or "recordkeeping" requirement because similar requirements are found in this section of the Commission's regulations and this section is entitled "Reporting and recordkeeping for decommissioning planning."[230] Similarly, Vermont's argument that, because VY is owned by a merchant generator, it lacks a guaranteed ratepayer base and, thus, there is the possibility that certain decommissioning or site restoration activities will not occur due to a lack of funding,[231] has already been directly addressed by the Commission's 10 C.F.R. § 50.75(h) rulemaking. In fact, the impetus for the 10 C.F.R. § 50.75(h) rulemaking was that

> [f]or licensees that are no longer rate-regulated, or no longer have access to a non-bypassable charge for decommissioning, the NRC is requiring that decommissioning trust agreements be in a form acceptable to the NRC in order to increase assurance that an adequate amount of decommissioning funds will be available for their intended purpose. Until recently, direct NRC oversight of the terms and conditions of the decommissioning trusts was not necessary because rate regulators typically exercised this type of oversight authority. With deregulation, this oversight may cease and the NRC needs to take a more active oversight role.[232]

Thus, the NRC has already addressed Vermont's concerns through rulemaking and Vermont cannot challenge the NRC's rulemaking determinations in this individual licensing proceeding

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[229] 67 Fed. Reg. at 78,335-36. *See also id.* at 78,341-342 (stating that the regulation "explicitly eliminat[es] the requirement to provide advance notification of decommissioning fund expenditures when § 50.82 applies" and that "the rule will not apply to those licensees operating under 10 CFR 50.82"); 10 C.F.R. § 50.75(h)(1)(B)(iv) (excluding notifications "[a]fter decommissioning has begun and withdrawals from the decommissioning fund are made under § 50.82(a)(8)").

[230] Emphasis added. Notably, Vermont also used the term "reporting" when referring to the disputed prior notification requirement. Petition at 29.

[231] Petition at 31.

[232] 67 Fed. Reg. at 78,332.

without requesting a waiver of 10 C.F.R. § 50.75(h), which it has not done. Consequently, Vermont's proposed Contention IV should be denied.

Finally, Vermont argues that the LAR is interrelated to all of Entergy's other actions having to do with the funding of decommissioning at VY and that, therefore, the NRC should perform a single environmental analysis of the funding of decommissioning at VY.[233] First, this argument is beyond the scope of this proceeding because, the scope of this proceeding, as noticed in the *Federal Register*, is limited to the issues raised in Entergy's LAR, which requests the deletion of license conditions.[234] Second, this argument is an inadmissible challenge to the Commission's decommissioning rules, which dictate that decommissioning be performed in the manner by which Entergy is proceeding. By arguing that "all of the decommissioning requests need to be evaluated in a single environmental analysis and a single hearing," Vermont is essentially arguing against the Commission's current decommissioning regulation at 10 C.F.R. § 50.82, which was promulgated by a 1996 rulemaking.[235] Before this 1996 rulemaking, licensees were required to submit a detailed "decommissioning plan" to the NRC for approval before beginning dismantlement, along with a supplemental environmental report that addressed environmental issues not already considered.[236] The NRC would then review the decommissioning plan and prepare a SE report, an EA, and, based on the EA, either a FONSI or EIS.[237] Upon NRC approval of the decommissioning plan, the Commission would then issue

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[233] Petition at 28.

[234] Vermont makes similar arguments in Contentions I and III. The Staff's responses to Contentions I and III explain that each of Entergy's other actions are outside the scope of this proceeding or otherwise impermissible. *See supra* Sections II.A.3 and II.C.

[235] *Id.* at 28-29. *See* 61 Fed. Reg. 39,278.

[236] *Id*. at 39,278.

[237] *Id*.

an order permitting the licensee to decommission its facility in accordance with the approved plan.[238] This process would trigger an opportunity for a hearing.[239]

Through its 1996 rulemaking, however, the Commission fundamentally changed this decommissioning process to better "establish a level of NRC oversight commensurate with the level of safety concerns expected during decommissioning activities."[240] Instead of a "decommissioning plan" with an environmental report that required NRC approval and triggered a hearing opportunity, the revised rule required the submission of a PSDAR, which, although it is made available for public comment and is the subject of a public meeting,[241] does not require an environmental report and subsequent environmental review by the NRC[242] or trigger a hearing opportunity.[243] Instead, ninety days after the submission of the PSDAR, the licensee can perform major decommissioning activities if the NRC does not offer an objection.[244] Thus, the revised rule no longer required licensees to "have an approved decommissioning plan before being permitted to perform major decommissioning activities."[245] On the contrary, licensees can, without NRC approval, conduct decommissioning consistent with their PSDAR and can even perform decommissioning activities inconsistent with the PSDAR if such changes are permitted under 10 C.F.R. § 50.59 and the licensee provides prior written notification to the NRC and copies the affected State or States.[246]

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[238] *Id*.

[239] *Id*.

[240] *Id*. at 39,279.

[241] *Id*. *See also* 10 C.F.R. § 50.82(a)(4)-(5).

[242] 61 Fed. Reg. at 39,283 ("Many commenters in favor of the rule fully supported the environmental impact considerations delineated in the proposed rule for the PSDAR submittal, with no mandatory ER or subsequent EA requirement.").

[243] *Id*. at 39,284.

[244] *Id*. at 39,279. *See also* 10 C.F.R. § 50.82(a)(4)-(5).

[245] 61 Fed. Reg. at 39,279.

[246] 10 C.F.R. § 50.82(a)(7).

The revised rule did not require the NRC's affirmative approval of decommissioning until the licensee's submission of a LTP at least two years before the termination of the license.[247] The process required for an LTP is "similar to the approach that [was previously] required for a decommissioning plan."[248] For instance, LTPs must include a supplement to the environmental report, pursuant to 10 C.F.R. § 51.53, describing any new information or significant environmental change associated with the licensee's proposed termination activities.[249] They also must be made available for public comment, be the subject of a public meeting, and they give rise to an opportunity for a hearing[250] because any Commission approval of LTPs is by license amendment.[251]

Vermont essentially wants the Commission to return to its pre-1996 decommissioning rule and provide for an environmental review and hearing opportunity at the PSDAR stage of decommissioning instead of at the LTP stage because, according to Vermont, the PSDAR "form[s] the basis for Entergy's assertion that the excess funds from the [DTF] to spend on irradiated fuel management will exist . . . ."[252] However, the Commission purposefully changed its decommissioning regulations so as not to require the licensee to submit a supplemental environmental report, not to require the NRC to perform an environmental analysis and safety evaluation, and not to require a hearing opportunity until the LTP stage of decommissioning.[253] The Commission determined that a hearing opportunity is appropriate at the LTP stage of decommissioning rather than at the PSDAR stage because "the final disposition of the site is

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[247] 10 C.F.R. § 50.82(a)(9).

[248] 61 Fed. Reg. at 39,280.

[249] 10 C.F.R. § 50.82(a)(9)(ii)(G).

[250] 10 C.F.R. § 50.82(a)(9)-(10).

[251] 10 C.F.R. § 50.82(a)(10).

[252] Petition at 28-29.

[253] 10 C.F.R. § 50.82(a)(9)-(10).

determined at that time."[254] Therefore, Vermont's argument that "[a] comprehensive analysis is required here in part to avoid segmenting environmental analyses into discrete parts without ever looking at their full combined effects – an approach that NEPA does not allow"[255] is a belated argument against the Commission's 1996 decommissioning regulations themselves.[256] Vermont's argument that this is additionally required by 10 C.F.R. §§ 51.20, 51.53(d), 51.61, 51.70, 51.101, and 51.103[257] is similarly defective. Vermont also cites to C*itizens Awareness Network, Inc. v. NRC*, 59 F.3d 284 (1st Cir. 1995) as support for its argument,[258] but does not acknowledge that the 1996 decommissioning rule explicitly addressed this court decision.[259] If Vermont would like to challenge the existing rule, Vermont can petition for a rulemaking under 10 C.F.R. § 2.802.[260]

In conclusion, Vermont's proposed Contention IV challenges the Commission's categorical exclusions rule, decommissioning trust rule, and decommissioning rule and, since

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[254] 61 Fed. Reg. at 39,284.

[255] Petition at 30.

[256] Notably, the Commission received similar comments as part of its 1996 rulemaking. *See, e.g.,* 61 Fed. Reg. at 39,283 ("Most of the commenters who were not in favor of the rule believed that the NRC should define decommissioning as a major Federal action requiring an EA or EIS. . . . A few commenters stated that the process outlined in the proposed rule abdicates NRC's responsibility to protect the health and safety of the workers, the public, the environment, and it also undermines citizen's due process."); *id*. at 39,284 ("Most commenters who did not favor the rule believed that the public participatory role proposed was inadequate. These commenters stated that NRC should retain the possession-only license amendment (POLA) and decommissioning plan approval required in the current rule to truly enhance public participation.").

[257] Petition at 26, 31.

[258] *Id*. at 30.

[259] *See* 61 Fed. Reg. at 39,285-86 ("In publishing this final rule, the Commission has explained the rationale for the new decommissioning process, and has concluded that nothing in the court decision dictates that the Commission take a specific approach to this issue or otherwise raises questions concerning the validity of the approach adopted in this rulemaking.").

[260] The Leshinskie Declaration also faults the PSDAR for its reliance on the Commission's Continued Storage Rule. Leshinskie Declaration at 2-3. This comment on the PSDAR is both beyond the scope of this proceeding, which concerns a distinct LAR and not the PSDAR, and an inadmissible challenge to a Commission Rule.

Vermont did not request a waiver of these rules, the Board should find that proposed Contention IV is inadmissible.[261]

CONCLUSION

For the reasons stated above, the Board should deny the Petition because Vermont has not proffered an admissible contention.

Respectfully submitted,

/Signed (electronically) by/

Anita Ghosh
Counsel for NRC Staff
United Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-4113
E-mail: Anita.Ghosh@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Beth Mizuno
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-3122
E-mail: Beth.Mizuno@nrc.gov

[261] Vermont also argues that a categorical exclusion is inappropriate because Entergy has "[failed] to demonstrate that it complies with the requirements of § 50.82(a)(8)(i)." Petition at 28. This argument is inadmissible because it is beyond the scope of this proceeding. Whether Entergy complies with 10 C.F.R. § 50.82(a)(8)(i) is a matter of NRC regulatory oversight, which Vermont may only pursue through a 10 C.F.R. § 2.206 petition for agency action. *St. Lucie*, CLI-14-11, 80 NRC at 174 (stating that "neither licensee activities nor NRC inspection of (or inquiry about) those activities provides the opportunity for a hearing under the AEA because those activities only concern compliance with the terms of an existing license" and that the appropriate means to challenge licensee actions is through a petition under 10 C.F.R. § 2.206).

Executed in Accord with 10 CFR 2.304(d)

Mitzi A. Young
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-3830
E-mail: Mitzi.Young@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Jeremy L. Wachutka
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-1571
E-mail: Jeremy.Wachutka@nrc.gov

Dated at Rockville, Maryland
this 15th day of May, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC	)	
AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LA-3
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO STATE OF VERMONT PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST," dated May 15, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 15th day of May, 2015.

/Signed (electronically) by/

Anita Ghosh
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-4113
E-mail: Anita.Ghosh@nrc.gov

Dated at Rockville, Maryland
this 15th day of May, 2015